

83-371



No.

In the Supreme Court of the United States
OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
SAMUEL A. ALITO, JR.
Assistant to the Solicitor General
LEONARD SCHAITMAN
FRANK A. ROSENFELD
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRUCE E. FEIN
General Counsel
DANIEL M. ARMSTRONG
Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTIONS PRESENTED

1. Whether the Government in the Sunshine Act, 5 U.S.C. 552b, which generally requires that agency meetings be open to public observation, applies when members of an administrative agency who do not constitute a quorum and have not been authorized to conduct official business on the agency's behalf participate in informal, general discussions with their foreign counterparts concerning issues of common interest.

2. Whether suit may be brought in district court to enjoin allegedly *ultra vires* action by the Federal Communications Commission even though jurisdiction to review that agency's orders is vested exclusively in the court of appeals and the precise issue raised in the district court suit could have been reviewed by this method.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the United States is a petitioner, and Southern Pacific Communications Company and RCA Global Communications, Inc., are respondents.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Reasons for granting the petition	10
Conclusion	25
Appendix A	1a
Appendix B	55a
Appendix C	59a
Appendix D	60a
Appendix E	70a

TABLE OF AUTHORITIES

Cases:

<i>Chisholm v. FCC</i> , 538 F.2d 349, cert. denied, 429 U.S. 890	24
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402	13
<i>Harrison v. PPG Industries, Inc.</i> , 446 U.S. 578	24
<i>Home Box Office, Inc. v. FCC</i> , 567 F.2d 9, cert. denied, 434 U.S. 829	24
<i>ITT World Communications, Inc. v. FCC</i> , 595 F.2d 897	5, 6
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U.S. 41	23
<i>New York State Broadcasters Ass'n v. United States</i> , 414 F.2d 990	24
<i>PATCO v. FLRA</i> , 672 F.2d 109	24
<i>Pennhurst State School v. Halderman</i> , 451 U.S. 1	19
<i>Sangamon Valley Television Corp. v. United States</i> , 269 F.2d 221	24

IV

Cases:—Continued	Page
<i>United States v. Chemical Foundation</i> , 272 U.S. 1	13
<i>Whitney National Bank v. Bank of New Orleans</i> , 379 U.S. 411	22-23
<i>Writers Guild of America, West, Inc. v. American Broadcasting Co., Inc.</i> , 609 F.2d 355, cert. denied, 449 U.S. 824	24
Statutes and regulations:	
Communications Act, 47 U.S.C. 151 <i>et seq.</i> ..	4
47 U.S.C. 151	4
47 U.S.C. 154(h)	11
47 U.S.C. 154(j)	19
47 U.S.C. 155(b)	12
47 U.S.C. 214	5, 12
47 U.S.C. 319	12
47 U.S.C. 402(a)	2, 5
47 U.S.C. 402(b)	5
Freedom of Information Act, 5 U.S.C. 552 ..	3
5 U.S.C. 552(b)(5)	3
Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 5 U.S.C. 552b .	2, 3
5 U.S.C. 552b(a)(1)	2, 3, 9, 11, 15
5 U.S.C. 552b(a)(2)	2, 3, 10, 11, 15, 17
5 U.S.C. 552b(b)	2, 11, 15, 21
5 U.S.C. 552b(c)	3, 11
5 U.S.C. 552b(c)(1)	19
5 U.S.C. 552b(c)(5)	3
5 U.S.C. 552b(c)(9)(A)	3
5 U.S.C. 552b(c)(9)(B)	4
5 U.S.C. 552b(c)(10)	4
5 U.S.C. 552b(d)	4
5 U.S.C. 552b(d)(1)	4
5 U.S.C. 552b(e)(1)	3, 21
5 U.S.C. 552b(f)	4
5 U.S.C. 552b(f)(1)	4, 21
5 U.S.C. 552b(h)(2)	4
5 U.S.C. 552b(h)(1)	4, 11

Statutes and regulations:—Continued	Page
Logan Act, 18 U.S.C. 953	8
Pub. L. No. 97-253, Title V, Section 501(b), 96 Stat. 805 (1982)	12
5 U.S.C. 704	22
15 U.S.C. 45(c)	22
15 U.S.C. 77i	22
15 U.S.C. 78y	22
15 U.S.C. 79x	22
21 U.S.C. 371(f)	22
28 U.S.C. 1391(e)	11
28 U.S.C. 2342	2, 5-6
28 U.S.C. 2347(3)	24
29 U.S.C. 160f	22
47 C.F.R.:	
Section 0.4	12
Section 0.215	12
Section 1.2	5, 21, 23
Section 1.401(a)	5
Section 1.401(c)	5
Section 1.403	5
Section 1.405(a)	5
Miscellaneous	
R. Berg and S. Klitzman, <i>An Interpretive Guide to the Government in the Sunshine Act</i> (1978)	13, 17
<i>Black's Law Dictionary</i> (5th ed. 1970)	16
3 K. Davis, <i>Administrative Law Treatise</i> § 23.03 (1958 & 1982 Supp.)	22
H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976)	17, 19
L. Jaffe, <i>Judicial Control of Administrative Action</i> (1965)	22
Note, <i>Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals</i> , 88 Harv. L. Rev. 980 (1975)	23

VI

Miscellaneous—Continued	Page
S. 5, 94th Cong., 1st Sess. (1975)	17
S. Rep. No. 94-354, 94th Cong., 1st Sess. (1975)	15, 17, 19
S. Rep. No. 94-1178, 94th Cong., 2d Sess. (1976)	17
<i>Webster's Third New International Dictionary</i> (1976)	16

In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Communications Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-54a) is reported at 699 F.2d 1219. The opinion of the district court (App. D, *infra*, 60a-66a) is not reported. The opinion of the Federal Communications Commission (App. E, *infra*, 70a-87a) is reported at 77 FCC 2d 877.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 55a-56a) was entered on February 1, 1983, and a timely petition for rehearing was denied on April 6, 1983 (*id.* at 57a-58a). By order dated July 1, 1983, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 3, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 402(a) of the Communications Act, 47 U.S.C. 402(a), provides:

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

28 U.S.C. 2342 provides in pertinent part:

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47; * * *.

The Government in the Sunshine Act, 5 U.S.C. 552b, provides in pertinent part:

(a) For purposes of this section—

(1) the term “agency” means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term “meeting” means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.

* * * * *

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with

this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

STATEMENT

1.a. In 1976, Congress enacted the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 5 U.S.C. 552b, which requires that any "meeting" of an "agency" covered by the Act must be open to public observation except in a few, specific circumstances. The term "agency" is narrowly defined (5 U.S.C. 552b(a)(1)) to include only those agencies

headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

The term "meeting" is defined (5 U.S.C. 552b(a)(2)) as: the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.

If a covered "agency" holds a "meeting" as defined in the Act, in most circumstances, the time, place, and subject matter of the meeting must be announced at least one week in advance. 5 U.S.C. 552b(e)(1). The meeting also must be open to the public unless one of the Act's ten exceptions applies (see 5 U.S.C. 552b(c)).¹

¹ Most of these exceptions mirror those in the Freedom of Information Act, 5 U.S.C. 552. However, the Sunshine Act has no analog to Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), which protects, *inter alia*, the internal deliberations of a government agency. And, unlike the FOIA, the Sunshine Act contains an exception for meetings at which a person is accused of a crime or is censured (5 U.S.C. 552b(c)(5)), as well as exceptions protecting against the premature disclosure of certain information from agencies that regulate currency, securities, commodities, or financial institutions (5 U.S.C. 552b(c)(9)(A)); premature disclosure of information that is likely significantly to frustrate im-

If the agency wishes to invoke one of those exceptions, it may do so only by a formal vote (5 U.S.C. 552b(d)(1)). In addition, the agency must make and maintain a complete transcript or recording of the meeting² and must permit public inspection of all portions of the transcript or recording not protected by the exemption under which the meeting was closed (5 U.S.C. 552b(f)).

"[A]ny person" may seek judicial review of an agency's compliance with the open-meeting requirement by filing suit "in the district court * * * for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia" (5 U.S.C. 552b(h)(1)). If the court finds that the agency has failed to satisfy the Act, it "may grant such equitable relief as it deems appropriate," including disclosure of the transcript or recording of the meeting (5 U.S.C. 552b(h)(1)).³

b. The Communications Act, 47 U.S.C. 151 *et seq.*, confers upon the Federal Communications Commission the power to regulate "interstate and foreign commerce in communication by wire and radio * * *" (47 U.S.C. 151). As part of this mission, the Commission regulates the operations of respondent and the other companies involved in this case, which are existing or proposed common carriers of "record" communications (*i.e.*, written communications, such as telex) in the international market. A common carrier may acquire facilities so as

plementation of a proposed agency action (5 U.S.C. 552b(c)(9)(B)); and discussions regarding a particular adjudication or a pending court case (5 U.S.C. 552b(c)(10)).

² If a meeting is closed under Exemption 8 (examination, operating and condition reports by agency that regulates financial institutions) or Exemption 9 (see note 1, *supra*), the agency may at its option prepare a set of detailed minutes rather than a full transcript or recording. 5 U.S.C. 552b(f)(1).

³ However, no court "having jurisdiction solely on the basis of [the Act is authorized] to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information * * *) taken or discussed at any agency meeting out of which the violation * * * arose." 5 U.S.C. 552b(h)(2).

to initiate new service only after it obtains from the Commission a certificate of "public convenience and necessity" (47 U.S.C. 214). As a practical matter, however, if the proposed new service is to be international, the carrier may not begin operations until it reaches agreement with the appropriate government agencies in the foreign countries it proposes to serve. See *ITT World Communications, Inc. v. FCC*, 595 F.2d 897 (2d Cir. 1979).

c. Under FCC regulations, "[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation." 47 C.F.R. 1.401(a). The petition "shall set forth * * * all facts, views, arguments and data deemed to support the action requested * * *" (47 C.F.R. 1.401(c)). The Commission then issues a "public notice" of the petition (47 C.F.R. 1.403), and "[a]ny interested person may file a statement in support of or in opposition to" it (47 C.F.R. 1.405(a)). The Commission's rules also permit aggrieved parties to petition for a declaratory ruling regarding the propriety of Commission actions, including those not theretofore embodied in orders subject to judicial review (47 C.F.R. 1.2).

Jurisdiction to review Commission orders, including declaratory rulings and orders denying petitions for rulemaking is vested exclusively in the courts of appeals. The relevant provision of the Communications Act provides (47 U.S.C. 402(a)):⁴

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

Chapter 158 of Title 28, in turn, provides at 28 U.S.C. 2342:

⁴ Section 402(b) permits an appeal to the United States Court of Appeals for the District of Columbia Circuit in cases involving certain types of orders, such as the denial of a license or construction permit.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47 * * *.

2.a. Respondent ITT World Communications, Inc. is an existing international record carrier in the trans-Atlantic market. In 1977, the FCC authorized two smaller companies, Graphnet Systems, Inc. and GTE Telenet Communications Corp., to enter into competition with respondent in this field. Respondent unsuccessfully challenged those authorizations in a petition for review filed in the Second Circuit. See *ITT World Communications, Inc. v. FCC*, 595 F.2d 897 (1979).

Despite the Commission's authorizations, the European telecommunications agencies, with which respondent has been doing business for years, refused to enter into interconnection arrangements with the new companies, and those companies were consequently unable to begin competing with respondent.⁵ See App. A, *infra*, 4a. Between October 1979 and October 1980, at conferences in Europe, three of the seven members of the Commission held informal discussions touching upon this situation with officials of the European and Canadian agencies.

These discussions took place at a series of conferences among telecommunications administrators called the "Consultative Process" (CP) (see App. E, *infra*, 78a). Begun in 1974, the CP was originally intended "to improve, through the exchange of information and views, the usage planning of jointly-owned telecommunications facilities in the North Atlantic Region" (*ibid.*). ITT actively supported the CP until the Commissioners attending a session in Dublin, Ireland, in October 1979

⁵ In recent years, these companies have obtained operating agreements with some foreign countries. They now offer limited service in competition with respondent.

initiated a preliminary discussion concerning the desirability of adding to the agenda topics such as new carriers and services (*ibid.*). "Out of apparent concern that such additional consultations could ultimately lead to greater competition in the provision of international communications services," respondent launched a two-pronged attack that "in effect challenge[d] the Commission's authority to engage in any form of foreign consultative discourse" (*id.* at 78-79a).

b. First, in October 1979, respondent petitioned the Commission for rulemaking. Respondent requested that the Commission issue a policy statement disclaiming any intent to negotiate with foreign telecommunications agencies and delineating the authority of Commissioners attending CP sessions (App. E, *infra*, 71a-72a). Respondent also sought the issuance of rules requiring that the Commission provide 30 days' advance public notice of all such meetings and the topics to be discussed and that any interested carrier be permitted to object to the scheduled topics to propose additional topics, and to express its views (*id.* at 72a). Under respondent's proposal, the Commission would have been required to indicate its disposition of all such comments received (*ibid.*) Furthermore, respondent sought the promulgation of regulations requiring that all such international consultations be open to the public in compliance "with the spirit and the letter" of the Sunshine Act; that all discussions be held on the record; and that all interested private parties be permitted to express their views (*id.* at 72a).⁶

The Commission denied respondent's rulemaking petition. The Commission stated that it had never negotiated with foreign telecommunications officials and that those officials had manifested understanding of the scope of the Commission's authority (App. E, *infra*, 79a-80a). The Commission observed that the Consultative Proc-

⁶ Respondent also charged that the CP meetings constituted *ex parte* proceedings and thereby violated respondent's right to due process. See App. E, *infra*, 73a.

ess did not involve negotiation but had provided "a valuable if not indispensable source of information" concerning "future foreign communications needs and the solutions to those needs that will be acceptable to other countries" (*id.* at 79a). The Commission stated that the discussions thereby "free[d] [the Commission] from near total dependence on [its] regulatees in gauging foreign telecommunications problems and needs" (*ibid.*). By the same token, the Commission noted that the discussions gave the attending Commissioners the opportunity "to explain and promote [the FCC's] statutory mandate" to foreign officials accustomed to legal and economic systems far different from ours (see *id.* at 81a-82a). The Commission concluded (*id.* at 81a) that the Communications Act, which confers upon the Commission the authority to regulate international communications, "clearly permits—in fact encourages"—the informal contacts challenged by respondent.

In addition, the Commission held (App. E, *infra*, 81a-84a) that the Sunshine Act does not apply to the CP sessions. However, "recogniz[ing] and support[ing] the desirability of conducting its activities, both formal and informal, within public view," the Commission adopted notice and reporting requirements with respect to contacts with foreign administrators (*id.* at 84a).

c. While its rulemaking petition was still pending (see App. A, *infra*, 12a), respondent filed suit against the Commission in the United States District Court for the District of Columbia, claiming among other things that the Commissioners were acting *ultra vires* by engaging in negotiations at the CP sessions and that they were violating the Sunshine Act (see App. D, *infra*, 61a-63a). The district court dismissed the *ultra vires* count for lack of standing and ripeness⁷ and expressed

⁷ The district court construed respondent's *ultra vires* claim as based on the Logan Act, 18 U.S.C. 953, which makes it a crime for unauthorized persons to negotiate with foreign governments, and held that only the State Department has standing to complain of the violation of that statute (App. D, *infra*, 63a). The court also concluded that the *ultra vires* claim would

doubt about its subject matter jurisdiction over that claim (*ibid.*; App. C, *infra*, 59a). The court also granted ITT's summary judgment motion on the Sunshine Act claim (*id.* at App. D, *infra*, 65a-66a; App. C, *infra*, 59a).⁸

d. Consolidating ITT's petition for review of the denial of rulemaking with cross-appeals from the district court judgment, the court of appeals held that the *ultra vires* count had been improperly dismissed and that the Sunshine Act applies to the CP sessions (App. A, *infra*, 13a-21a, 34a-45a). The court also reversed in part the FCC's denial of rulemaking (*id.* at 45a-53a).

The court of appeals concluded that the district court had subject matter jurisdiction over the *ultra vires* count because, in the court of appeals' view, that claim presented different issues from the rulemaking petition, de novo judicial factfinding was needed, and the allegedly improper Commission action would not otherwise be subject to judicial review (App. A, *infra*, 13a-17a).

Turning to the interpretation of the Sunshine Act, the court of appeals first considered the provision making the Act applicable only at gatherings attended by a quorum of the full agency or a subdivision authorized to act on its behalf (5 U.S.C. 552b(a)(1)). The court noted that the attending Commissioners constituted a quorum of one of the Commission's two standing committees, the Telecommunications Committee. While acknowledging that the limited authority delegated to the Telecommunications Committee by the FCC rules did not authorize it to act on the Commission's behalf at the CP

not be ripe until the two new carriers were accepted by the foreign entities, at which time respondent could "object through the formal rulemaking process" (*ibid.*).

* Respondent also sought disclosure under the Freedom of Information Act of certain documents related to the CP meetings. See App. E, *infra*, 71a n.1. The district court ordered disclosure of the documents (App. D, *infra*, 63a-65a), but the court of appeals reversed as to all but two of them (App. A, *infra*, 21a-34a). The government does not seek review of the court of appeals' decision with respect to those two documents.

sessions, the court inferred that such authority had been granted informally and in contravention of the Communications Act (App. A, *infra*, 36a-37a). The court did not decide whether the CP sessions constituted "deliberations," one of the key elements needed for Sunshine Act coverage (see 5 U.S.C. 552b(a)(2)) (see App. A, *infra*, 37a). Finally, the court held (*id.* at 38a-40a) that the CP sessions resulted in the conduct of "official agency business" within the meaning of the Act (5 U.S.C. 552b(a)(2)) because, in the court's view, important matters related to agency business were discussed and because the court saw no relevant distinction between those discussions and "hearings [and] meetings with the public," which, according to the court's reading of the legislative history, were intended to fall within the statutory coverage (App. A, *infra*, 38-39a).

The court of appeals also reversed the denial of rulemaking on the Sunshine Act issue (App. A, *infra*, 48a), remanded the Commission's refusal to delineate its authority at the CP sessions for failure to compile an adequate administrative record (*id.* at 49a-53a), and "direct[ed] that, so long as the [Telecommunications] Committee continues to play [the same] role in the consultative process, it do so only pursuant to a proper and precise delegation of authority from the Commission" (*id.* at 53a). To prevent "duplication, conflicting resolutions, and further delay" because of its double remand to the Commission and the district court, the court of appeals suggested that the Commission stay further action on the rulemaking petition until the district court disposes of the *ultra vires* claim (*id.* at 52a).

The Commission's petition for rehearing was denied, with Judges MacKinnon, Bork, and Scalia voting for rehearing en banc.

REASONS FOR GRANTING THE PETITION

The court of appeals has issued two important rulings that threaten significant interference with the proper and efficient functioning of administrative agencies.

The court has held that the Sunshine Act applies to informal exchanges, overseas, by agency delegates with their foreign counterparts, even though the delegates have no authority to act for the agency. And the court has held that persons challenging agency action may bypass normal statutory review procedures by filing suit in district court alleging that the agency has acted *ultra vires*.

These rulings are plainly wrong and will produce deleterious consequences. Because all suits under the Sunshine Act (see 5 U.S.C. 552b(h)(1)) and the vast majority of suits alleging *ultra vires* action by administrative agencies (see 28 U.S.C. 1391(e)) may be brought in the United States District Court for the District of Columbia, review by this Court is warranted at the present time.

1. a. The Sunshine Act requires (5 U.S.C. 552b(b)) that "every portion of every meeting of an agency shall be open to public observation" unless it falls within one of the Act's exceptions (see 5 U.S.C. 552b(c)). As previously noted, the term "agency" is limited to a "collegial" body or "any subdivision thereof authorized to act on behalf of the agency" (5 U.S.C. 552b(a)(1)). The term "meeting" is defined as the "deliberations" of a quorum of the agency or an authorized subdivision "where such deliberations determine or result in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)). Thus, the Sunshine Act applies only if (i) a quorum of an agency or "subdivision thereof authorized to act on behalf of the agency" (ii) engages in "deliberations" (iii) that "determine or result in the joint conduct or disposition of official agency business." None of these elements is satisfied here.

b. i. The CP sessions were not attended by a quorum of the Commission or any authorized subdivision. It is undisputed that a quorum of the Commission—then four members⁹—was not present. The court of appeals

⁹ 47 U.S.C. 154(h). Effective July 1, 1983, the size of the Commission was reduced from seven to five members, and a

held, however, that the Act applied because a quorum of the three-person Telecommunications Committee (see 47 C.F.R. 0.215)—one of the Commission's two standing committees (47 C.F.R. 0.4)—was in attendance. That holding, however, will not withstand analysis.

First, the Commission's rules plainly show that the Telecommunications Committee was not authorized to act on the Commission's behalf at the CP sessions. Pursuant to the Communications Act (47 U.S.C. 155(b)), the Commission has delegated specific, limited functions to the Telecommunications Committee (47 C.F.R. 0.215), *i.e.*, the authority to act upon applications by common carriers for certificates of public convenience and necessity (47 U.S.C. 214) and certain applications for radio station construction permits (47 U.S.C. 319). It has never been suggested that the Telecommunications Committee members engaged in either of these activities at the CP gatherings. Accordingly, they were not "authorized to act on behalf of the [Commission]" at those gatherings, and if they had purported to do so, their actions would have been of no effect.

Nevertheless, the court of appeals inferred that the Commission had made an unofficial and, indeed, an unlawful delegation of authority to its Telecommunications Committee,¹⁰ and the court held that such a dele-

quorum was therefore reduced from four to three. Pub. L. No. 97-253, title V, sec. 501(b), 96 Stat. 805 (1982).

¹⁰ The court of appeals concluded (App. A, *infra*, 36a-37a; footnotes omitted) that unofficial authorization had been granted because

(1) Committee members attend CP exchanges in their "official roles"; (2) their goal is to build a "consensus" that will "lead ultimately to operating agreements for ITT's competitors" and (3) they convey the information and views "exchanged" at the meetings to the full Commission for its consideration.

However, similar factors will likely be present whenever representatives of an administrative agency attend an international or other conference. They are almost certain to attend in their official capacities; the conference undoubtedly will have some objective related to the agency's functions; and the representa-

gation suffices to activate the Sunshine Act's requirements (App. A, *infra*, 36a-37a, 52a-53a).

Not only was there no basis for the court of appeals factfinding, but the court completely disregarded the normal presumption of administrative regularity. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *United States v. Chemical Foundation, Inc.* 272 U.S. 1, 14-15 (1926). The court reasoned (App. A, *infra*, 36a) that "applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will." Whatever attraction the court's interpretation may have at first blush, it is inconsistent with the language of the Act and will in practice prove to be unworkable.

The language of the Sunshine Act shows that an agency "subdivision" is not "authorized to act on behalf of the agency" unless it has received an official delegation of authority. The very term "subdivision" connotes a body that has been officially created and that has a fixed membership and responsibilities, rather than a loose group informally assigned by an agency to assist it in the performance of certain tasks. The requirement that a quorum of the subdivision must be present also suggests that the subdivision must have a fixed, ascertainable membership, for otherwise it would be impossible to determine whether a quorum is in attendance. As a leading treatise on the Sunshine Act states (R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* 3 (1978)): "At a minimum, a subdivision must have a specified membership and fixed responsibilities; an informal working group authorized to report back to the body is not a subdivision."

tives will probably report back to their colleagues. Thus, if the factors upon which the court of appeals relied are sufficient to show unofficial authorization and to overcome the force of regulations withholding official authorization, the presumption of administrative regularity will be eviscerated.

The quorum requirement also suggests that the subdivision must possess the authority to take formal action on behalf of the agency rather than merely the responsibility to assist the full agency in some way. The latter function may be performed whether or not a quorum of a subdivision is present. Thus, if Congress intended the Act to cover bodies possessing only such informal power, it is difficult to understand why it included the quorum requirement. On the other hand, a quorum is needed in order for the subdivision to take formal action, and therefore the quorum requirement makes perfect sense if, as we maintain, the Sunshine Act reaches only those agency subdivisions possessing officially delegated powers.

Practical considerations also suggest that Congress intended this interpretation. If the Sunshine Act were satisfied by unofficial authorization or authorization in contravention of governing statutes or rules, as the court of appeals held, a colorable Sunshine Act claim could be asserted whenever agency members engaged in any activity related to their official responsibilities. In all such instances, it could be claimed that, despite proof that official authorization had not been granted or even had been expressly withheld, the members in fact received unofficial, implied, or sub rosa authorization to act on the agency's behalf. Persons asserting such claims would predictably demand the right to discover all information bearing upon the question of unofficial authorization. Such evidentiary proceedings obviously would create a great potential for harassment and interference with the proper functioning of the agency. Congress could not have wanted to encourage these results.

The court of appeals concluded that unofficial authorization satisfies the Sunshine Act because the court wished to prevent evasion of the Act's requirements (see App. A, *infra*, 36a). However, the court overlooked several factors that significantly limit the importance of this problem. If agency members purport to take official action on the agency's behalf without prop-

er authorization, their action may be set aside. On the other hand, if they do not purport to take such action but merely assist the full agency, any official action subsequently taken by the agency will be subject to the Sunshine Act's constraints. Moreover, an agency willing to delegate its authority in order to evade the Sunshine Act's requirements may easily do so by authorizing a single agency member¹¹ or agency employees¹² to act on its behalf. While Congress recognized such possibilities,¹³ it chose not to make the Act's coverage absurdly broad solely to preclude all chance of evasion.

ii. The Sunshine Act applies only if an agency or authorized subdivision engages in "deliberations [that] result in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)). Although the court of appeals dealt at length with the problem of defining "the joint conduct or disposition of official agency business" (see App. A, *infra*, 37a-43a), the court dispensed altogether with the requirement that the agency or subdivision must engage in "deliberations." The court wrote (*id.* at 37a):

"Deliberations" might be read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency. On the other hand, "conduct . . . of official agency business" suggests a much broader

¹¹ The Act is limited to "joint" conduct. See 5 U.S.C. 552b(b) (emphasis added) ("[m]embers shall not *jointly* conduct or dispose of agency business other than in accordance with this section"); 5 U.S.C. 552b(a)(2) ("meeting" defined to include only "the *joint* conduct or disposition of agency business"). Thus the Act does not apply where only one agency member is present. S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

¹² Agency employees, even when authorized to act on behalf of the agency, are not covered because the Act applies only to "agency" meetings, and the term "agency" is defined as a collegial body appointed by the President with the advice and consent of the Senate or any subdivision of that body (5 U.S.C. 552b(a)(1)). See S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

¹³ See S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

range of activity, including, *inter alia*, hearings and meetings with outsiders.

The court then proceeded to examine the latter question (*id.* at 37a-43a), never to return to the requirement of "deliberations."¹⁴ The court thus excised one of the Act's key elements.

The court of appeals' radical surgery greatly expanded the Act's coverage. The term "deliberations" is defined as "weighing and examining the reasons for and against a choice or measure" and as "discussion and consideration by a number of persons of the reasons for and against a measure." *Webster's Third New International Dictionary* 596 (1976); see also *Black's Law Dictionary* 384 (5th ed. 1970). Thus, as the court of appeals itself suggested (App. A, *infra*, 37a), the term excludes the gathering of information when not related to any pending or prospective agency decision, as well as efforts to explain the basis for or to facilitate compliance and cooperation with a decision that has already been completed.¹⁵ By reading the element of "deliberations" out of the statute, the court was able to reach precisely the opposite result.

¹⁴ The court of appeals mentioned the term "deliberations" at one subsequent point in its opinion, stating (App. A, *infra*, 39a) that Commissioners participating in the CP sessions may "gather[] information and opinions" that may prove useful in some unidentified future FCC deliberations. But the mere fact that attendance at an event may furnish information that may be useful in future deliberations does not mean that the event itself involves "deliberations." Reading documents or inspecting facilities may furnish such information, but those activities can hardly be termed "deliberations."

¹⁵ In another portion of its opinion, the court of appeals essentially acknowledged that the CP discussions were not "deliberations." Rejecting the argument that certain documents prepared by FCC staff members during those conferences were protected by the deliberative process privilege from disclosure under the FOIA (App. A, *infra*, 31a-34a), the court wrote (*id.* at 34a; footnotes omitted): "It is not enough for an agency to assert that factual material 'may be used' in future deliberations; the agency must demonstrate that the material at issue is inextricably intertwined with a *specific* deliberative proceeding."

iii. The final element required for Sunshine Act coverage is that the deliberations must "result in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)). The legislative history indicates that this language, while extending beyond those sessions at which an agency formally disposes of a matter (S. Rep. No. 94-354, 94th Cong., 1st Sess. 18 (1975) (hereinafter "S. Rep."), does not include every gathering at which some reference is made to agency business.¹⁶ The authoritative Senate report¹⁷ (S. Rep. 18) states:

To be a meeting the discussion must be of some substance. Brief references to agency business where the commission members do not give serious attention to the matter do not constitute a meeting. * * * The words "deliberation" and "conduct" were carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of this section.

The same report goes on to indicate that "informal and preliminary discussions," as opposed to "discussions which effectively predetermine official actions," do not fall within the Act (*id.* at 19). Adopting this same limitation, R. Berg and H. Klitzman, *supra*, at 9 (emphasis added) concludes:

A discussion which is sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably *firm positions regarding matters pending or likely to arise before the agency* is a meet-

¹⁶ Indeed, in an apparent effort to narrow the legislation's coverage, the Conference Committee amended the bill so that it would apply only when "deliberations *determine or result in* the joint conduct or disposition of agency business" (5 U.S.C. 552b(a)(2)); emphasis added) rather than when they merely "concern the joint conduct of agency business" S. 5, 94th Cong., 1st Sess., § 201(a) (1975).

¹⁷ The Conference Report (H.R. Rep. No. 94-1441, S. Rep. No. 94-1178, 94th Cong., 2d Sess. 11 (1976)) adopted the Senate report's explanation of the term "meeting."

ing, while, in our view, a discussion which is *merely informational or exploratory* is not.

Under this interpretation, it seems clear that the CP sessions did not "result in the joint conduct or disposition of official agency business." The court of appeals did not identify any official FCC action that had been predetermined at those gatherings; nor did the court find that the discussions focused on any discrete proposal related to any matters pending or likely to arise before the agency. On the contrary, the court found that the CP sessions served two far different purposes. First, the court stated (App. A, *infra*, 38a-39a; emphasis added) that the meetings "are an important means *for gathering information and opinions* from foreign administrations" and that such information may prove useful in future, unidentified FCC deliberations. As previously noted, however, a discussion that is merely informational and that does not relate to any pending or prospective agency action falls outside the Act.

Second, the court of appeals found (App. A, *infra*, 39a) that the FCC had "chosen the CP as the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements." However, accepting for the sake of argument the accuracy of the court's description of the CP sessions, such efforts on the part of the Commissioners in attendance did not predetermine or relate to any future FCC decision or any matter pending or likely to arise before the Commission, since the Commission had already authorized Graphnet and Telenet to enter the trans-Atlantic record communications market. Rather, the Commissioners merely sought to explain the basis for and thus facilitate implementation of a decision that had previously been made.

Disregarding the limitations clearly spelled out in the legislative history, the court of appeals adopted a sweeping interpretation of the phrase "conduct or disposition of official agency business." The court rejected "a distinction between an agency's *predecisional* activities and its *postdecisional* efforts to implement, interpret, and promote its policies" (App. A, *infra*, 39a);

found that merely "gathering information" may trigger the Act's coverage (*id.* at 38a-39a); and concluded that "informal background discussions" may also fall within the Act, particularly if "outside parties" are present (*id.* at 41a-43a). Apart from the suggestion that "chance meetings," "social gatherings," and informal conversations among agency members are usually not covered by the Act (see App. A, *infra*, 43a), the only easily discernible limitation in the court's definition is that covered sessions must entail discussion that is related to the agency's work in a way felt by the court to be important (see *id.* at 38a). This limitation obviously provides little guidance.¹⁸

¹⁸ The only authority cited by the court of appeals (see App. A, *infra*, 38a & n.154) for its sweeping interpretation is three isolated sentences in the House and Senate reports suggesting that public meetings and hearings are covered by the Act. See H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 7 (1976); S. Rep. 17, 18. The court then reasoned (*id.* at 39a-40a) that "hearings" and "meetings with the public" are indistinguishable from other discussions between agency members and outsiders.

The court of appeals "read too much into these scattered bits of legislative history." *Pennhurst State School v. Halderman*, 451 U.S. 1, 20 (1981). There is a vast difference between agency "hearings," on the one hand, and discussions, like the CP sessions, between agency members and a small group of nonmembers, on the other. Hearings are usually formal, focus upon a particular proposal or problem—and are usually open to the public unless a sensitive subject is being discussed, in which case one of the Sunshine Act exceptions may apply. See, *e.g.*, 47 U.S.C. 154(j) (FCC hearings open to public upon request but may be closed to protect secret national defense information); see also 5 U.S.C. 552b(c)(1) (Sunshine Act exception for similar information). Discussions, by contrast, are frequently informal, wide-ranging, and exploratory; and privacy is often essential if they are to be useful.

The other proposition upon which the court of appeals relied—that "meetings with the public" must be open to the public—is merely a statement of the obvious (and is based upon a single sentence in the Senate report (S. Rep. 18)). Yet the court drew heavily upon this redundancy, and thus concluded that the Act proscribes virtually all informal, off-the-record discussions between an agency or subdivision quorum and outside parties. Consequently, a sentence in the Senate report that must have

c. The cumulative effect of the court of appeals' interpretation of the elements needed for Sunshine Act coverage gives the Act a startling reach far exceeding anything Congress intended. Under the court of appeals' approach, the Act would appear to apply whenever two or more agency members acting under what may be deemed unofficial agency authorization attend a gathering at which any matter viewed by the courts as related in some significant way to the agency's business is discussed. This interpretation of the Act—which regulates informal, general discussions far removed from any prospective official agency action—will unduly isolate agency members and thus hamper the effective performance of their responsibilities.

It may be that in a future case the court of appeals would draw back from the broad pronouncements in its opinion here. We would certainly urge it to do so. But there will be no opportunity for that court to rectify its decision unless agencies deliberately take actions that are arguably in violation of the broad pronouncements in the decision below. Since agency members are quite properly reluctant to engage in such conduct, the court of appeals' decision will have a harmful chilling effect as long as it remains in force.

The present case graphically illustrates the deleterious results that the court of appeals' construction will produce. Rapid technological advances have heightened the need for international coordination in many regulatory fields, including communications; and such coordination demands that administrators from different countries understand each other's objectives and strategies, as well as the technical, economic, legal, and political constraints under which they work. The best way to achieve the necessary mutual understanding is often through meetings at which administrators from different countries may meet face-to-face and engage in gen-

seemed innocuous and self-evident to any congressman who read it is virtually the only reed supporting the court of appeals' far reaching interpretation of one of the Act's key provisions.

eral, wide-ranging, and informal discussions. If such meetings must be open to the public (5 U.S.C. 552b(b)), if there must be a formal agenda (5 U.S.C. 552b(e)(1)), and if discussions must be recorded or transcribed (5 U.S.C. 552b(f)(1)), then the utility of such gatherings will be greatly reduced. Indeed, it can be expected that foreign participants will frequently make clear—as happened here¹⁹—that they will not tolerate such peculiarly American restrictions, particularly upon meetings held on foreign soil. As a consequence, no discussions will be held or the American administrators will be effectively precluded from participation. This will not mean more government in the sunshine. It will mean more international misunderstanding and less effective regulatory coordination. No one will benefit—except regulatees like respondent, which will have found a new and ingenious way to thwart the administrative process.

2. Equally damaging to the administrative process is the court of appeals' holding (App. A, *infra*, 13a-16a) that respondent is entitled to sue the FCC in district court for the purpose of correcting allegedly *ultra vires* agency action. The court reached this conclusion even though exclusive jurisdiction to review FCC orders is vested in the courts of appeals, even though an issue virtually identical to respondent's *ultra vires* claim had been presented in respondent's rulemaking petition and was before the court of appeals in respondent's petition for review of the denial of rulemaking, and even though respondent, by a motion to the Commission for a declaratory ruling (47 C.F.R. 1.2), could have raised the identical issue embodied in its district court claim. The court of appeals' decision on this issue is a marked de-

¹⁹ No CP sessions have been held since the court of appeals' decision. Pursuant to an order of the court of appeals entered before this case was decided, the last CP session, held in Madrid, Spain, in October 1980, was taped, but the European participants objected strongly, and this gathering proved far less useful than its predecessors. (See Affidavit of Willard L. Demory (App. 1a-5a to FCC Br. in the court of appeals in Nos. 80-2324, 80-2401)).

parture from settled law. See 5 U.S.C. 704 (agency action is reviewable in district court under Administrative Procedure Act where "there is no other adequate remedy in a court").²⁰

a. Initial review of FCC orders, like those of many other administrative agencies,²¹ is committed exclusively to the courts of appeals, rather than the district courts. This procedure ensures that challenges to administrative action are presented to the agency prior to judicial review; it guarantees that administrative action will not be delayed or reversed by a single district court judge but may only be set aside by a panel of appellate judges; it provides for review by a court with far greater cumulative expertise concerning sometimes arcane administrative matters; it streamlines the administrative process by removing a layer of judicial review; it reinforces the rule that agency decisions should be reviewed on the administrative record, rather than based upon *de novo* judicial factfinding; it prevents interference with agency work and harassment of agency members and staff through time-consuming discovery requests and trial court proceedings; and it lessens the likelihood of conflicting adjudications concerning the same issue. See generally *Whitney National Bank v.*

²⁰ The court of appeals' decision stands the proper review procedure on its head because, not only does it recognize concurrent district court jurisdiction, contrary to Congress' express command, but it grants this illegitimate form of review precedence over the statutorily-mandated procedure by suggesting that the Commission "stay[] further action on ITT's rulemaking petition pending the district court's resolution of the *ultra vires* issue" (App. A, *infra*, 51a-52a). Compare *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 422 (1965) (the likelihood of "duplicative procedures" and "conflicting determinations" "militate[s] in favor of the conclusion that the statutory steps provided in the Act are exclusive").

²¹ See *e.g.*, 15 U.S.C. 45(c) (Federal Trade Commission); 15 U.S.C. 77i, 78y, 79x (Securities and Exchange Commission); 21 U.S.C. 371(f) (Food and Drug Administration); 29 U.S.C. 160f (National Labor Relations Board). See also 3 K. Davis, *Administrative Law Treatise* § 23.03 at 302-306 (1958 & 1982 Supp.); L. Jaffe, *Judicial Control of Administrative Action* 157 (1965).

Bank of New Orleans, 379 U.S. 411, 419-423 (1965); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 983 (1975).

b. The court of appeals acknowledged that exclusive jurisdiction to review FCC orders is committed to the courts of appeals (App. A, *infra*, 13a), but the court found that concurrent district court jurisdiction was appropriate in this case for three reasons. None of those reasons, however, provides an adequate ground for permitting a regulatee such as respondent to bypass the prescribed method of judicial review.

First, the court of appeals observed that respondent's rulemaking petition and its *ultra vires* count were not identical. The court remarked (App. A, *infra*, 14a) that while the "petition asked the Commission for a declaration of the nature of its authority with respect to the CP meetings," the *ultra vires* claim "assert[ed] that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so." In our view, there is no real difference between these two issues. The Commission certainly did not detect any such distinction. It stated (App. E, *infra*, 77a) that respondent's petition raised the issue "whether the Commission has engaged in 'negotiations.'" And the Commission concluded (*ibid.*) that it "ha[d] not 'negotiated' with foreign entities."

But even if there is a distinction between the issues raised in respondent's rulemaking petition and its district court complaint, that distinction is wholly the result of the way in which respondent chose to frame its pleadings. By couching its rulemaking petition in slightly different terms or by moving the Commission for a declaratory ruling (47 C.F.R. 1.2) concerning the legality of the Commissioners' conduct at the CP sessions, there is no doubt that respondent could have brought before the Commission *precisely* the same claim asserted in the *ultra vires* count. Any subsequent Com-

mission order would then have been reviewable only in the courts of appeals.²² Respondent should not be allowed to circumvent the review procedures established by Congress solely because it artfully constructed a razor-thin distinction between the claims asserted in its administrative and district court pleadings.

The court of appeals' second reason for recognizing concurrent jurisdiction was the alleged inadequacy of the administrative record as a basis for evaluating respondent's *ultra vires* claim and the purported need for "the kind of independent, *de novo* factfinding appropriate in the district court" (App. A, *infra*, 15a; footnote omitted). But the court ignored the fact that any need for additional factfinding could easily have been met by remanding the case to the Commission for supplementation of the administrative record²³ or, if necessary, by referring the case to a district court judge as special master for proceedings in accordance with the court of appeals' specific guidelines and directions (see 28 U.S.C. 2347(b)(3)).

The court of appeals' final reason for allowing respondent's *ultra vires* claim to go forward was that the challenged FCC action would not otherwise be subject to judicial review (App. A, *infra*, 16a). As previously noted, however, review in the court of appeals was available in two ways: by a petition for review of the denial of respondent's rulemaking request or by petition for review of a declaratory ruling.

²² For cases involving court of appeals' review of FCC declaratory rulings, see *Chisholm v. FCC*, 538 F.2d 349, 364-365 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976); *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990 (2d Cir. 1969).

²³ See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 594 (1980). This procedure has been followed even where, as here, the factfinding concerned alleged agency impropriety. See, e.g., *PATCO v. FLRA*, 672 F.2d 109 (D.C. Cir. 1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 58-59 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). See also *Writers Guild of America, West, Inc. v. American Broadcasting Co., Inc.*, 609 F.2d 355, 363-364 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

c. Even if the court of appeals' holding is limited to claims alleging unlawful agency action not embodied in an order subject to judicial review, its harmful potential is significant. Such claims are easy to imagine, and the decision below will encourage their assertion. By making burdensome and intrusive discovery requests, by pressing for time-consuming evidentiary hearings and other court proceedings, and, worst of all, by seeking to stay related administrative proceedings, litigants may postpone or prevent important agency action inimical to their interests. Even if such suits are ultimately unsuccessful on the merits, they may nevertheless achieve their intended results. The present case well illustrates this point, for as long as respondent can keep its district court action alive, it can effectively prevent discussions between FCC members and their European counterparts that might endanger respondent's profitable preferred status. This Court should grant review to prevent such unwarranted interference with the administrative process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE

Solicitor General

J. PAUL McGRATH

Assistant Attorney General

KENNETH S. GELLER

Deputy Solicitor General

SAMUEL A. ALITO, JR.

Assistant to the Solicitor General

LEONARD SCHAITMAN

FRANK A. ROSENFELD

Attorneys

BRUCE E. FEIN

General Counsel

DANIEL M. ARMSTRONG

Associate General Counsel

Federal Communications Commission

SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1721, 80-2324 and 80-2401

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN PACIFIC COMMUNICATIONS COMPANY,
RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS

ITT WORLD COMMUNICATIONS, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

ITT WORLD COMMUNICATIONS, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Argued April 16, 1982

Decided Feb. 1, 1983

Before TAMM and MIKVA, Circuit Judges, and
BAZELON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge
BAZELON.

BAZELON, Senior Circuit Judge:

These appeals present a variety of important questions arising under the Communications Act of 1934,¹ the Freedom of Information Act ("FOIA"),² the Government in the Sunshine Act ("Sunshine Act"),³ and the

¹ As amended, 47 U.S.C. § 151 *et seq.* (1975 & Supp. IV 1980).

² 5 U.S.C. § 552 (1976 & Supp. V 1981).

³ *Id.* § 552b

Administrative Procedure Act ("APA").⁴ The issues all grow out of a series of international conferences organized by the Federal Communications Commission ("FCC" or "Commission"). Since 1974, the FCC's Telecommunications Committee ("Committee") has periodically met with representatives of foreign telecommunications administrations and carriers to discuss matters of common concern, particularly the planning of shared facilities. These gatherings, known as "consultative process" ("CP") meetings, have routinely been transcribed and open to all interested parties, including representatives of American carriers. Beginning late in 1979, however, the Committee moved to expand the focus of the CP meetings and to exclude American carriers from the expanded discussions.⁵

One of the excluded carriers, ITT World Communications, Inc. ("ITT"), has since engaged in a two-front campaign to have these meetings reopened. The present appeals concern both prongs of that campaign. In Numbers 80-2324 and 80-2401, ITT appeals a judgment of the district court dismissing its complaint that the Committee's actions at the closed meetings are *ultra vires*. The Commission cross-appeals accompanying judgments rendered against it under FOIA and the Sunshine Act.⁶ In Number 80-1721, ITT petitions for review of a Commission order denying its petition for a rulemaking that would establish regulations governing the conduct of the CP.⁷

⁴ *Id.* § 551 *et seq.*

⁵ See *infra* notes 16-26 and accompanying text.

⁶ See *ITT World Communications, Inc. v. FCC*, Civ. No. 80-0428 (D.D.C. Oct. 17, 1980) [hereinafter cited without cross-reference as "District Court Opinion"], reprinted in Joint Appendix ("JA") at 148-55.

⁷ See Petition of ITT World Communications, Inc., 77 F.C.C.2d 877 (1980) [hereinafter cited as "Rulemaking Denial"].

On January 2, 1981, this court denied ITT's motion to consolidate these appeals, but directed that they be presented on the same day before the same panel.

For the reasons set forth below, we

- (1) reverse the district court's dismissal of ITT's *ultra vires* complaint and remand for further proceedings;
- (2) affirm in part, reverse in part, and remand in part the district court's order directing the Commission to disclose all materials identified in response to ITT's FOIA request;
- (3) affirm the district court's determination that the CP meetings are governed by the provisions of the Sunshine Act; and
- (4) reverse in part and remand in part the Commission's rulemaking denial.

I. BACKGROUND

A. *The Closed CP Meetings*

International record service⁸ has long been dominated, at the American end, by four firms known as the International Record Carriers ("IRCs").⁹ ITT is one of those carriers.¹⁰ In an effort to foster greater competition in this field,¹¹ the Commission in 1977 authorized

⁸ Record service is the telecommunication of information in written or graphic form, and includes telegram, telex, and typewriter exchange services. The Commission is taking steps to eliminate the regulatory distinction between record and voice communications. See *Western Union Int'l, Inc. v. FCC*, 673 F.2d 539, 541 & n. 4 (D.C.Cir. 1982).

⁹ For background, see Preliminary Audit and Study of Operations of Int'l Carriers, 75 F.C.C.2d 726 (1980); H.R. REP. NO. 356, 97th Cong., 1st Sess. 5, 25-32, U.S. Code Cong. & Admin. News 1981, p. 2730 (1981).

¹⁰ The other major IRCs are Western Union International, Inc., RCA Global Communications, Inc., and TRT Communications Corporation. Together these four carriers have a 98.5% share of American traffic in the international record communications market. H.R. REP. NO. 356, 97th Cong., 1st Sess. 31 (1981) (chart 14) (1980 figures). RCA has intervened in No. 80-1721 in support of ITT's rulemaking petition.

¹¹ The Commission's international competition policies parallel its efforts with respect to domestic record service. See generally *Western Union Tel. Co. v. FCC*, 665 F.2d 1126 (D.C.Cir.

two smaller common carriers, GTE Telenet Communications Corp. ("Telenet") and Graphnet Systems, Inc. ("Graphnet"), to offer specialized international service.¹² The Commission's competition policy, however, has met a formidable obstacle: American carriers obviously cannot provide international service without links to correspondent carriers abroad,¹³ and to date Telenet and Graphnet have been unable to secure interconnection agreements with European administrators.¹⁴ The foreign administrations apparently oppose greater competition in the private sector, preferring instead to deal exclusively with the established American carriers.¹⁵

1981); *Western Union Tel. Co. v. FCC*, 665 F.2d 1112 (D.C.Cir. 1981).

¹² *Graphnet Syss., Inc.*, 63 F.C.C.2d 402 (1977), *aff'd in part and remanded in part sub nom. ITT World Communications, Inc. v. FCC*, 595 F.2d 897 (2d Cir. 1979). Departing from its usual practice, the Commission granted these authorizations even though Telenet and Graphnet had not yet obtained the necessary interconnection agreements to commence international service. This prompted the Second Circuit to remand for the Commission to make the two carriers' authorizations contingent on their obtaining operating agreements within a reasonable time. 595 F.2d at 902-03.

¹³ United States carriers technically own and control the overseas circuits only to a fictional midpoint, where fictional "handoffs" to correspondent foreign carriers occur. The participating carriers divide revenues according to negotiated agreements. See *RCA Communications, Inc. v. United States*, 43 F. Supp. 851, 853 (S.D.N.Y. 1942).

¹⁴ See Brief for Respondents in No. 80-1721, at 7 [hereinafter cited without cross-reference as "FCC Brief"]. Telecommunications services in most countries are provided by government agencies known as "administrations"; these agencies are also referred to as "PTTs" (Postal, Telephone, and Telegraph authorities).

¹⁵ See generally Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 885; H.R.REP. No. 356, 97th Cong., 1st Sess. 10-13, 35-36, 39-40 (1981). See also 1 Martech Strategies, Inc., Competition and Deregulation in International Telecommunications 12 (July 10, 1981) (contracted report for National Telecommunications and Information Administration), quoted in H.R.REP. No. 356, *supra*, at 36:

In response, the Commission in 1979 turned to the consultative process as a forum for encouraging foreign cooperation with the newly authorized carriers. The CP had been initiated five years earlier as a means to exchange and discuss technical information related to the operation of jointly owned communications facilities; meetings were transcribed and open to all interested parties.¹⁶ At the October 1979 CP meeting in Dublin,

...The PTTs overwhelmingly prefer the status quo [*sic*] to the changes proposed by the Commission. In essence, they perceive the proposed changes as challenging their monopoly position and control over telecommunications usage and pricing of services. European PTTs appear relatively satisfied with the existing international telecommunications industry structure The PTTs also claimed that the decisions would not substantially result in improved services to their customers.

The intense opposition [*sic*] on the part of foreign PTTs to the FCC's restructuring proposals established a formidable barrier to entry, if not a block, in the near term.

In an effort to circumvent this unwillingness, Congress recently enacted the Record Carrier Competition Act of 1981, Pub. L. No. 97-130, 95 Stat. 1687 (to be codified at 47 U.S.C. § 222). That Act directs American record carriers with overseas interconnections to make their circuits available to carriers without interconnectons "upon terms and conditions which are just, fair, and reasonable." 47 U.S.C.A. § 222(c)(1)(A)(i) (West Supp. 1982). If a foreign administration refuses to assign American-bound record traffic to a carrier without an interconnection agreement, the assigned carrier must pass along to the unassigned carrier a share of traffic proportionate to the level of foreign-bound traffic generated by the unassigned carrier. *Id.* § 222(c)(1)(A)(ii)(I). Although not affecting the operational practices of the interconnecting foreign carriers, this arrangement therefore has the effect of promoting competition among American record carriers and "reduc[ing] the ability of monopoly foreign administrations to impede competition." H.R.REP. No. 356, *supra*, at 12-13, U.S. Code Cong. & Admin. News 1981, pp. 2738-39.

¹⁶ For background on the CP, see AT&T Co. (TAT-7), 73 F.C.C.2d 248, 254-55 (1979); Policies for Overseas Common Carriers, 73 F.C.C.2d 193 (1979). The technical exchanges are intended to "lead to the formulation of ... traffic forecasts, data bases and analytical methodologies for assessing the service reliability and economical aspects of facilities alternatives." *Policies, supra*, 73 F.C.C.2d at 195.

Ireland, however, the Telecommunications Committee persuaded its foreign counterparts to expand the meeting's focus to include "the United States' authorization of new telecommunications services and carriers" and to exclude representatives of American carriers from this part of the meeting.¹⁷ In addition to the Dublin meeting, a February 1980 meeting in Ascot, England, and an October 1980 meeting in Madrid, Spain, were closed during discussions of this topic.

The specific nature of these off-the-record discussions is sharply contested and cuts to the heart of these appeals. Conceding that "international negotiation is the province of the State Department,"¹⁸ the Commission characterizes the closed encounters as merely "informal talks" that, like the public CP meetings, facilitate "the exchange of information and views."¹⁹ More precisely, the sessions are designed "to improve foreign understanding of the bases for and the nature of our pro-competition policies and, at the same time, to increase our knowledge of any unique telecommunications problems or policies which may exist in a particular country"²⁰ According to the Commission, the Committee does not officially lobby on the Commission's behalf: To the extent that "some commissioners have *encouraged* the foreign entities to cooperate with the policies of the FCC," as opposed to merely *informing* them of Commission policies, "these comments represent the personal views of the Commissioners, not official agency policy . . ."²¹

¹⁷ FCC Brief at 9.

¹⁸ Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 884 n.4.

¹⁹ *Id.* at 883, 885; *see also* FCC Brief at 20, 24, 30; Brief for FCC in Nos. 80-2324 & 80-2401, at 3, 20, 23 & n.11 (filed on behalf of the FCC by the Department of Justice) [hereinafter cited without cross-reference as "DOJ Brief"] Affidavit of Comm'r Robert E. Lee (Oct. 23, 1980) [hereinafter cited without cross-reference as "Lee Affidavit"], *reprinted in* JA at 587-89.

²⁰ Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 885.

²¹ Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, at 24 (emphasis

ITT argues that the Committee's efforts at the closed meetings constitute negotiation, and there is considerable evidence that would appear to contradict the Commission's characterization of the discussions as mere unofficial "information exchanges." First, the Commission concedes that Committee members attend CP meetings in their official capacities,²² and indeed argues that their attendance is necessary to discharge its statutory duty to regulate international communications.²³ Second, Commission representatives have described the closed exchanges as a "mechanism" to "narrow differences and to move toward consensus . . . on common principles and approaches";²⁴ the Commission acknowledges that such consensus is designed to "lead ultimately to operating agreements for ITT's competitors."²⁵ Finally, ITT presents evidence that the Commission has used the meetings as a forum to advise foreign administrations of a linkage between their cooperation with the newly authorized American carriers and the Commission's receptivity to their needs in other areas.²⁶

added) [hereinafter cited without cross-reference as "FCC District Court Memorandum"], *reprinted in* JA at 514. *See also* FCC Brief at 31-32 n. 26; DOJ Brief at 21-24; Lee Affidavit ¶ 2, *reprinted in* JA at 587.

²² *See* DOJ Brief at 24.

²³ *See* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883, 884-85. *See also infra* notes 37-39 and accompanying text.

²⁴ Telex from Robert R. Bruce, General Counsel, FCC, to Robert Seguin, Vice-President, Teleglobe Canada, at 3-4, 9-10 (Mar. 19, 1979), *reprinted in* JA at 218-19, 224-25. *See also infra* note 26 and accompanying text.

²⁵ FCC Brief at 24; *see also id.*, at 4; Affidavit of Willard L. Demory, ¶ 8 (Feb. 13, 1981) ("The Europeans appreciate the opportunity to communicate with us directly and prefer this to [discussions] through diplomatic channels.") [hereinafter cited without cross-reference as "Demory Affidavit"], *reprinted in* DOJ Brief at 4a.

²⁶ For example, Commission Chairman Chairman Charles Ferris asserted in 1979 that the Committee seeks to apply "leverage" at the meetings to "bring a greater sense of urgency to our correspondents overseas so that they will give due consider-

B. *The Rulemaking Proceeding*

ITT filed a petition for rulemaking on October 29, 1979. After questioning the Commission's authority to meet privately with foreign administrations on behalf of individual American carriers, ITT proposed that if such contacts continue they should be governed by published rules of policy and procedure. Such rules, it argued, are necessary to guard against Commission prejudgment of pending and future proceedings, to protect against *ex parte* influences, to ensure an effective record for judicial scrutiny of any disputes growing out of the meetings, and generally to enhance the quality of the CP exchanges.

ITT characterized its proposed rules as addressed to "the what" and "the how" of CP meetings.²⁷ With respect to "the what," ITT proposed that the Commission (1) "expressly disclaim[] any intention to negotiate with foreign administrations";²⁸ (2) delineate the authority of commissioners attending CP meetings; and

ation to the competitive environment . . . [we] have in the United States." *Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 96th Cong., 1st Sess. 1578, 1586 (1979) (remarks of Chairman Charles D. Ferris). Referring to Commission authorizations of transatlantic communications cables (TATs), another commissioner has stated that the FCC expects a "'tit' for 'tat'" and a "quid pro quo." Transcript of Montreal CP Meeting, at 108-09 (Mar. 22, 1979) (remarks of Comm'r Joseph R. Fogarty), *reprinted in* JA at 229-30. Similarly, another commissioner has said that the Committee is "talking to people in a negotiating stance abroad." Transcript of FCC Open Meeting, at 2 (Apr. 22, 1980) (remarks of Comm'r Abbott Washburn), *reprinted in* JA at 415. *See also id.* at 5 (remarks on Comm'r Robert E. Lee), *reprinted in* JA at 418; Transcript of FCC Open Meeting, at 9-10 (Feb. 8, 1980) (remarks of Comm'r Fogarty), *reprinted in* JA at 409-10.

²⁷ Petition for Rulemaking Concerning Contacts Between the F.C.C. and Foreign Telecommunications Administrations, RM 3523, at 2 (filed Oct. 24, 1979) [hereinafter cited without cross-reference as "Rulemaking Petition"], *reprinted in* JA at 16-40.

²⁸ *Id.* at 22-23, *reprinted in* JA at 37-38.

(3) direct commissioners to refrain from discussing pending proceedings at the meetings or "advancing the interest of one American carrier or service at the expense of any other."²⁹ With respect to "the how," ITT proposed that the Commission (1) require the transcription or recording of all CP meetings; (2) open the meetings to the public in accordance with the requirements of the Sunshine Act; (3) provide comprehensive notice-and-comment procedures prior to the meetings;³⁰ and (4) provide an opportunity for interested parties to make oral or written presentations at the meetings.

After receiving comments and reply comments,³¹ the Commission on May 2, 1980, released its order denying ITT's petition. The Commission addressed itself to four issues:

(1) whether the Commission has engaged in "negotiations"; (2) whether the Commission has statutory power to make *any* contacts with foreign governments or telecommunications entities; (3) whether the *Government in the Sunshine Act* is applicable; and (4) whether there are *ex parte* and other due process questions involved here.³²

The Commission devoted a substantial part of its discussion to the first issue. Characterizing the closed discussions as "[i]nformal talks ... to improve foreign

²⁹ *Id* at 23, reprinted in JA at 38.

³⁰ Specifically, the petition asked the Commission to (a) provide at least 30 days' notice in advance of any meeting with representatives of foreign administrations or telecommunications entities of the time, place, and subject matter of the proposed discussions; (b) provide all interested parties the opportunity to comment on the "propriety or wisdom" of the proposed agenda and to propose additional subjects for discussion; and (c) issue another public notice responding to all comments received. See *id.* at 23-24, reprinted in JA at 38-39.

³¹ Comments were filed by RCA Global Communications, Satellite Business Systems, Southern Pacific Communications Company, Telenet, and Graphnet; reply comments were filed by ITT, RCA, and Western Union International. See JA at 44-131.

³² Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 882 (emphasis in original).

understanding,"³³ it insisted that it had not ventured "into the area of formal international negotiation."³⁴ According to the Commission, negotiation "connotes a formal diplomatic process for the development and formulation of various kinds of binding executive agreements and treaties."³⁵ The parties at the CP meetings, however, have not formulated such accords. Moreover, "participants in such negotiations ordinarily have authority to speak for their respective countries and to commit them," subject to formal ratification procedures.³⁶ The Telecommunications Committee, on the other hand, has no authority to bind our government to any agreements. This lack of negotiating authority, the Commission added, is clearly understood by foreign administrations.

Turning to its authority to engage in informal talks, so construed, the Commission concluded that "contacts with foreign administrations are not only permissible but are encouraged by the Communications Act."³⁷ Citing sections in the Act that grant it authority to license international communication by wire and radio,³⁸ the Commission characterized the discussions as a means to "advance our progress toward realization of statutory goals" and as "a necessary and natural corollary" of its statutory authority.³⁹

The Commission then considered whether the CP discussions are "meetings" within the meaning of the Sunshine Act. The Act defines a "meeting" as "the deliberations of at least the number of individual agency

³³ *Id.* at 885.

³⁴ *Id.* at 883.

³⁵ *Id.*

³⁶ *Id.* at 884.

³⁷ *Id.* at 882; *see also id.* at 884.

³⁸ *Id.* at 884-85 & n. 6. The Commission cited sections 1, 214, 301, 303(n), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 214, 301, 303(n), 303(r) (1976). It also invoked section 201(c) of the Communications Satellite Act of 1962, 47 U.S.C. § 721(c) (1976).

³⁹ Rulemaking Denial, *supra* note, 7, 77 F.C.C.2d at 885.

members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."⁴⁰ The Commission concluded that, for two reasons, this definition does not encompass the consultative process. First, the presence of at least four of the seven commissioners—a quorum—is required for the Commission to transact business, unless it delegates authority pursuant to 47 U.S.C. § 155(d)(1)(1976).⁴¹ The Commission has not delegated authority to the Committee to act on its behalf at the CP sessions, however, and because only three commissioners sit on the Committee, the threshold requirement of an authorized quorum has not been met. Second, because informal exchanges of information are not a "deliberative process," the Committee's activities do not constitute "the joint conduct or disposition of official agency business."

The Commission concluded that "[m]ost of ITT's remaining arguments are in reality addressed to the advisability, rather than the legality, of informal discussions with foreign administrations."⁴² It labelled ITT's prejudgment and *ex parte* arguments as "speculative," and argued that existing rules adequately protect against these dangers.⁴³

The Commission did, however, announce that as a discretionary matter it would (1) provide a notice-and-comment period on the time and place of each individual meeting, the persons expected to attend, and the topics to be discussed; (2) open the meetings to observers "unless it is determined that circumstances exist which warrant closure";⁴⁴ and (3) hold public briefings before and after the meetings. The Commission emphasized that "[t]hese procedures are flexible, and we expressly reserve the right to depart from them where necessary

⁴⁰ 5 U.S.C. § 552b(a)(2) (1976).

⁴¹ See *infra* note 145 and accompanying text.

⁴² Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 887.

⁴³ *Id.*

⁴⁴ *Id.* at 888.

to accommodate any special circumstances which may arise with respect to a specific conference."⁴⁵

This petition for review followed. ITT maintains that the Commission's order denying its rulemaking petition is arbitrary, capricious, an abuse of discretion, and contrary to law.

C. *The District Court Action*

ITT filed this action on February 12, 1980, while the Commission was considering its rulemaking petition.⁴⁶ Its complaint asserts three claims for relief:

Count I ("the *ultra vires* count") alleges that the Commission has used the closed CP meetings to negotiate with foreign governments on behalf of ITT's competitors, and it asserts that the alleged negotiations "are unlawful and *ultra vires*, and in excess of the authority conferred on the FCC by the Communications Act."⁴⁷ The count asks for declaratory and injunctive relief.

Count II ("the FOIA count") seeks disclosure under FOIA of a number of documents pertaining to the regulation of international record service.

Count III alleges that the Telecommunications Committee's participation in the closed CP discussions violates the Sunshine Act's open meeting rules.

The Commission moved for dismissal or summary judgment, and ITT cross-moved for summary judgment on the FOIA and Sunshine Act counts. The district court(1) dismissed the *ultra vires* count, holding that ITT did not have standing to secure judicial review and that the issue was not ripe for adjudication; (2) granted ITT's motion for summary judgment on the FOIA count, holding that the Commission had failed to substantiate its claim of "deliberative process" privilege

⁴⁵ *Id.*

⁴⁶ Complaint, *ITT World Communications, Inc. v. FCC*, Civ. No. 80-0428 (D.D.C.) (filed Feb. 12, 1980) [hereinafter cited without cross-reference as "Complaint"], reprinted in JA at 196-208.

⁴⁷ *Id.* ¶ 22, reprinted in JA at 204.

with respect to the disputed documents; and (3) granted ITT's motion for summary judgment on the Sunshine Act count, holding that the CP discussions are "meetings" within the meaning of the Act.

ITT appeals the district court's dismissal of the *ultra vires* count. The Commission cross-appeals the court's summary judgment on the FOIA and Sunshine Act counts. Because our review of the district court action sheds considerable light on issues presented by the rulemaking denial, we first consider in turn the three counts of ITT's complaint.

II. THE *Ultra Vires* COUNT

The district court "seriously doubt[ed]" whether it had subject matter jurisdiction over the *ultra vires* count.⁴⁸ It did not reach this issue, however, dismissing instead on standing and ripeness grounds. We conclude that the district court's reservations about its jurisdiction were unfounded and that it erred in its rulings on standing and ripeness.

A. Subject Matter Jurisdiction

ITT argues that the district court has jurisdiction to hear the *ultra vires* claim under 28 U.S.C. § 1331 (1976 & Supp. V 1981), the general grant of federal question jurisdiction. The Commission counters that jurisdiction over the issue lies exclusively with this court as part of our review of the order denying ITT's petition for rulemaking. Invoking 28 U.S.C. § 2342(1) (1976) and 47 U.S.C. § 402(a)(1976), which together grant exclusive jurisdiction to review FCC final orders to the courts of appeals, the Commission argues that the *ultra vires* count is a collateral attack against that part of its order defining the scope of its authority to meet with foreign administrations. District court intervention, the Commission contends, would therefore circumvent the prescribed review procedure and require an "unwarranted duplication of the work of the Court of Appeals."⁴⁹

⁴⁸ District Court Opinion at 4, reprinted in JA at 151.

⁴⁹ FCC District Court Memorandum at 3, reprinted in JA at 493; see also DOJ Brief at 14-15.

A strong presumption against concurrent district court jurisdiction would be appropriate if the issues presented by ITT's rulemaking petition and its *ultra vires* count were indeed identical.⁵⁰ The Commission's argument, however, blurs an important distinction between the rulemaking petition and the *ultra vires* count. The petition asked the Commission for a declaration of the nature of its authority with respect to the CP meetings and argued that "negotiation" is outside the scope of that authority. The Commission fully agreed that it has no authority to negotiate, but it disagreed as to the necessity of rules spelling out this lack of authority with greater clarity. The gravamen of the *ultra vires* count is very different. There ITT asserts that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so. Contrary to the Commission's argument that "[t]he specific content of the CP meetings is only evidence for [the] general issue" of the scope of its authority,⁵¹ the "content" of the meetings is *itself* the issue.

We have emphasized that the jurisdiction of the district court is properly invoked where *de novo* judicial factfinding is necessary for a fair examination of the disputed issues.⁵² The instant controversy presents a

⁵⁰ See, e.g., *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S.Ct. 551, 558, 13 L.Ed.2d 386 (1965); *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C.Cir. 1979); *Independent Cosmetic Mfrs. & Distributors, Inc. v. United States Dep't of HEW*, 574 F.2d 553, 555 & n. 2 (D.D.Cir.), cert. denied, 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978); *Nader v. Volpe*, 446 F.2d 261, 266-68 (D.C.Cir. 1972). See also 5 U.S.C. § 703 (1976).

⁵¹ DOJ Brief at 15.

⁵² See, e.g., *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531, 533-34 (D.C.Cir. 1980). ("[A]gency action is aptly examined in the District Court when the court proceeding is to be *de novo* and based on a new record compiled in the court itself. Where review is to be on the *agency record*, the Court of Appeals is well suited to consider the challenge in the first instance.") (emphasis in original) (footnote

paradigm of this circumstance. Rather than call for review of an agency action that has itself been embodied in a record, the *ultra vires* count requires scrutiny of conduct occurring outside the formal administrative process. The agency "record" in the rulemaking denial, which consists simply of the Commission's conclusory assertions that it has not negotiated and of certain statements by Commission officials that contradict these assertions, is manifestly inadequate for such an evaluation.⁵³ ITT's colorable *ultra vires* claim can therefore be tested only through the kind of independent, *de novo* factfinding appropriate in the district court.⁵⁴

The Commission seems to argue, however, that even if its *instant* order does not provide a suitable vehicle for review, *future* agency actions based on its alleged *ultra vires* conduct would, so that district court intervention would nevertheless be unwarranted. Thus, the Commission asserts that if it "take[s] some action detrimental to ITT in the future, as a *quid pro quo* for European cooperation today," ITT "would have the opportu-

omitted), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1352, 67 L.Ed.2d 336 (1981); *Investment Co. Inst. v. Board of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C.Cir. 1977) (order reviewable in court of appeals "is interpreted to mean any agency action capable of review on the basis of the administrative record"); *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 916 (D.C.Cir. 1973) ("It is the availability of a record for review . . . which is now the jurisdictional touchstone."); *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 143 (D.C.Cir.), *cert. denied*, 404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 57 (1971).

⁵³ For more on the Commission's rulemaking record, see *infra* notes 194-202 and accompanying text.

⁵⁴ As discussed *infra* Part V-B, we cannot affirm the Commission's order denying ITT's rulemaking petition on the basis of the record before us. There is some tension between our remand of that order for further consideration and our remand of the *ultra vires* count for district court factfinding; the practical effect of our decision is that both the district court and the Commission will consider the nature of the Committee's off-the-record activities. We discuss coordination of this "double remand" *infra* p. 1248.

nity ... to challenge *that* action and its basis" in a statutory review proceeding.⁵⁵

Again, however, the Commission misstates the focus of ITT's allegations. Where an agency action is not reviewable in the courts of appeals, district court jurisdiction may nevertheless be inappropriate if the action is interlocutory in nature and can be corrected on court-of-appeals scrutiny of a subsequent, final action.⁵⁶ We have emphasized, however, that such preclusion of district court review is inappropriate where the challenged action would be "beyond the capabilities of the statutorily-prescribed methods of review to repair."⁵⁷ Such a danger of "irretrievable subversion" of ITT's "substantial rights"⁵⁸ is readily apparent in this case. The Committee's activities at the CP meetings are not calculated to result in a final order, but rather to lead to unreviewable action by foreign administrations. Thus, as we discuss more fully in Part II-C below, subsequent judicial or administrative proceedings would not likely provide an adequate remedy for the Commission's alleged misconduct. The district court therefore has subject matter jurisdiction over the *ultra vires* count.⁵⁹

⁵⁵ FCC Brief at 24 (emphasis added).

⁵⁶ See, e.g., *Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 619-22 (D.C.Cir.1979); *id.* at 626 (Wright, C.J., concurring in the result); see also 5 U.S.C. § 704 (1976). This preference for statutory remedies reflects important policies, including deference to administrative expertise, respect for administrative autonomy, and avoidance of piecemeal review. See, e.g., *City of Rochester v. Bond*, *supra* note 50, 603 F.2d at 936; *Nader v. Volpe*, *supra* note 50, 466 F.2d at 267-68. It also embodies aspects of ripeness, exhaustion, and finality doctrines. See, e.g., *Association of Nat'l Advertisers, Inc. v. FTC*, *supra*, 617 F.2d at 620-21; *Nader v. Volpe*, *supra* note 50, 466 F.2d at 268; cf. *Gulf Oil Corp. v. United States Dep't of Energy*, 663 F.2d 296, 307-13 (D.C.Cir. 1981).

⁵⁷ *Association of Nat'l Advertisers, Inc. v. FTC*, *supra* note 56, 617 F.2d at 621 (footnote omitted).

⁵⁸ *Nader v. Volpe*, *supra* note 50, 466 F.2d at 266, 269.

⁵⁹ The Commission argues that district court jurisdiction is appropriate only where there is a demonstrated, "patent" violation of agency authority, and that "[w]hatever this Court's ultimate view of the scope of the FCC's authority ... it surely is

B. Standing

Under the Administrative Procedure Act, a party has standing to secure judicial review of any "agency action" that causes a "legal wrong."⁶⁰ The district court held that ITT has not suffered a legal wrong, reading its complaint solely to allege a violation of the Logan Act's prohibition of unauthorized negotiation with foreign governments.⁶¹ Because only the Department of State is aggrieved by violations of that criminal statute, the court reasoned, ITT's alleged injury is not legally cognizable.

We respectfully conclude that the district court misread ITT's complaint. The gravamen of ITT's allegation is quite specific. "The activities of the FCC . . . are unlawful and *ultra vires*, and in excess of the authority

not acting in violation of any *clear* statutory prohibition or committing any *patent* violation of its authority." DOJ Brief at 16 (emphasis added). The "patent violation" doctrine is well established, *see, e.g., Leedom v. Kyne*, 358 U.S. 184, 188-91, 79 S.Ct. 180, 183-85, 3 L.Ed.2d 210 (1958); *Independent Cosmetic Mfrs. & Distributors, Inc. v. United States Dep't of HEW*, *supra* note 50, 574 F.2d at 555, but it is inapposite to the instant controversy. Contrary to the Commission's suggestions, the doctrine is *not* designed to restrict general federal question jurisdiction over agency actions to a small category of egregious cases, or to subject plaintiffs to a high burden in alleging a *prima facie* case of agency misconduct. Rather, the doctrine is properly invoked only where district court jurisdiction would otherwise be entirely concurrent with that of the courts of appeals—that is where reliance on statutory review would provide thorough examination of the issues and ensure adequate relief on appeal. This is not a case of true concurrency, however, because (1) *de novo* factfinding is necessary, and (2) subsequent statutory review would accord ineffectual relief.

⁶⁰ 5 U.S.C. § 702 (1976).

⁶¹ The Logan Act, 18 U.S.C. § 953 (1976), prohibits unauthorized "correspondence or intercourse" by United States citizens

with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States.

conferred on the Commission by the *Communications Act*.⁶² Whether the complaint's two references to the Logan Act⁶³ should be construed as an attempt to state a separate cause of action (as the Commission insists) or as mere illustrative matter not intended to assert a claim (as ITT argues), a cause of action under the Communications Act has clearly been alleged.

As a regulated carrier, ITT has standing to complain of *ultra vires* Commission actions that threaten it with competitive injury.⁶⁴ If ITT's allegations are correct,⁶⁵ the Commission is engaged in a course of conduct that clearly rises to the level of reviewable "agency action."⁶⁶ If successful, that action will cause

⁶² Complaint ¶ 22, reprinted in JA at 204 (emphasis added).

⁶³ *Id.* ¶¶ 10, 21, reprinted in JA at 199, 203-04.

⁶⁴ On the rules governing standing, see generally *Bryant v. Yellen*, 447 U.S. 352, 366-68, 100 S.Ct. 2232, 2340-41, 65 L.Ed.2d 184 (1980); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-46, 96 S.Ct. 1917, 1923-28, 48 L.Ed.2d 450 (1976); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151-55, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970); *Control Data Corp. v. Baldrige*, 655 F.2d 283, 288-89 (D.C.Cir.), cert. denied, 454 U.S. 881, 102 S.Ct. 363, 70 L.Ed.2d 190 (1981).

⁶⁵ As we assume in reviewing the district court's dismissal. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

⁶⁶ See, e.g., *Writers Guild of America, West Inc. v. American Broadcasting Co., Inc.*, 609 F.2d 355, 365 (9th Cir. 1979) ("Regulation through 'raised eyebrow' techniques or through forceful jawboning is commonplace in the administrative context, and in some instances may fairly be characterized . . . as official action by the agency.") (footnotes omitted), cert. denied, 449 U.S. 824, 101 S.Ct. 85, 66 L.Ed.2d 27 (1980); *Hercules, Inc. v. FPC*, 552 F.2d 74, 77-78 (3d Cir. 1977) ("jawboning strategy"); *Independent Broker-Dealers' Trade Ass'n v. SEC*, supra note 52, 442 F.2d at 137-43 (informal pressure tactics); *Moss v. CAB*, 430 F.2d 891, 897-900 (D.C.Cir. 1970) (same). Compare *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974) (individual commissioner's speech representing unofficial views not "agency action"). Cf. *Consolidated Edison Co. of New York, Inc. v. FPC*, 512 F.2d 1332, 1341-43 (D.C.Cir.), clarified, 518 F.2d 448 (D.C.Cir. 1975).

substantial injury to ITT's economic interests.⁶⁷ Moreover, there can be no question that the interests sought to be protected by ITT are within the Communications Act's broad zone of protected interests.⁶⁸ The Commission's argument that ITT has no right to avoid enhanced competition misses the mark. ITT has standing to insist that the Commission *implement* its competi-

⁶⁷ It might be argued, although the Commission has not done so, that the presence of foreign administrations in the causal chain makes ITT's threatened injuries too speculative. It is not inconceivable that, independent of the Commission's efforts, the foreign administrations will enter into operating agreements with the new American carriers. The record shows that European opposition to the new competition is intense, however, and ITT's complaint is that the Commission's "negotiations" and "leverage" are likely to override this intransigence. The Commission *itself* acknowledges the causal nexus, conceding that its behind-the-scenes actions are designed to effectuate operating agreements for the new carriers. See *supra* notes 24-25 and accompanying text. ITT's allegations have therefore established a sufficient likelihood that the relief it requests will benefit it in a tangible, perceptible way. Compare *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978); *United States v. SCRAP*, 412 U.S. 669, 688-90, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1042-43 & n. 11 (D.C.Cir. 1979) with *Warth v. Seldin*, *supra* note 65, 422 U.S. at 505, 95 S.Ct. at 2208; *Winpisinger v. Watson*, 628 F.2d 133, 138-39 (D.C.Cir. 1980).

⁶⁸ See, e.g., *Association of Data Processing Serv. Orgs., Inc. v. Camp*, *supra* note 64, 397 U.S. at 153, 90 S.Ct. at 829; *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422-23, 62 S.Ct. 1194, 1202-03, 86 L.Ed. 1563 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940).

Our standing test also requires that there be no "clear and convincing" indication of congressional intent to withhold judicial review. *Control Data Corp. v. Baldridge*, *supra* note 64, 655 F.2d at 288-89. There is no such indication in this case.

tion policy in a manner that does not exceed its authority under the Communications Act.⁶⁹

C. Ripeness

The district court held that the *ultra vires* count was not ripe for adjudication, reasoning that "[t]he two new carriers have not yet been accepted by the foreign entities. When and if they are so accepted, Plaintiff can object through the formal rulemaking process, and derive relief if its claim is cognizable and meritorious."⁷⁰

This holding is flawed under familiar ripeness doctrine, which requires an evaluation of (1) "[t]he fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration."⁷¹ The Committee has already engaged in three closed meetings with foreign administrations. The threatened injury to ITT resulting from these encounters does not depend on other types of Commission action. The issue whether the Committee's efforts at the meetings were unlawful is therefore eminently fit for judicial consideration.

Moreover, contrary to the district court's reasoning, a subsequent judicial proceeding would not likely pro-

⁶⁹ We express no views on the scope of the Commission's authority to meet with foreign administrations. Nor do we consider whether the Commission's efforts on behalf of Graphnet and Telenet constitute arbitrary action with respect to other regulated carriers. Cf. *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C.Cir. 1976). Finally, we do not consider whether alleged attempts to "leverage" foreign administrations through facilities authorization decisions, see *supra* note 26 and accompanying text, would violate the "public convenience or necessity" standard of 47 U.S.C. § 214(a) (1976).

⁷⁰ District Court Opinion at 4-5 (citation omitted), *reprinted* in JA at 151-52.

⁷¹ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). On ripeness doctrine, see generally *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43, 101 S.Ct. 488, 493-95, 66 L.Ed.2d 416 (1980); *Gulf Oil Corp. v. United States Dep't of Energy*, *supra* note 56, 663 F.2d at 309-13.

vide an adequate remedy for the Commission's alleged misconduct.⁷² Actions by foreign administrations obviously could not be overturned in American fora, and the new carriers' certificates of public convenience and necessity, awarded before the Committee began to meet privately with foreign administrations, could not be revoked on the basis of subsequent Commission misdeeds. In addition, prospective rulemaking after the foreign administrations had acted could not undo the harm that ITT seeks to prevent: coerced entry of foreign administrations into agreements with Telenet and Graphnet. The *ultra vires* issue is therefore ripe for judicial consideration.⁷³

III. THE FOIA COUNT

Three days after the first closed meeting in Dublin, ITT requested the Commission to identify and release all agency communications "with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents."⁷⁴ The Commission released eight items but withheld fifteen others.⁷⁵ After exhausting its administra-

⁷² This inadequacy is also a touchstone of our subject matter jurisdiction analysis. See *supra* note 55-58 and accompanying text.

⁷³ The district court did not address the Commission's assertion that ITT failed to exhaust its administrative remedies, nor has the Commission pressed this argument on appeal.

⁷⁴ Letter from Grant S. Lewis to Executive Director, FCC, at 1 (Oct. 12, 1979), *reprinted in* JA at 159.

⁷⁵ Letter from Philip L. Verveer, Chief, Common Carrier Bureau, to Grant S. Lewis (Nov. 16, 1979), *reprinted in* JA at 161-69. Most of the items released were copies of letters and telexes between Commission officials and representatives of foreign administrations. Also released were five pages of a transcript of a CP meeting held in Montreal, Canada, in March 1979, and correspondence between ITT and the Commission. See *id.*, Attachment I, *reprinted in* JA at 167.

tive remedies,⁷⁶ ITT brought this action to compel disclosure of those items.

The Commission relies exclusively on the executive "deliberative process" privilege embodied in 5 U.S.C. § 552(b)(5) (1976) ("Exemption 5"), which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency."⁷⁷ To sustain its burden of proof,⁷⁸ the Commission submitted an index to the documents, five affidavits, and a memorandum of points and authorities.⁷⁹

⁷⁶ ITT filed an Application for Review on December 17, 1979. See JA at 170-83. Because the Commission failed to respond to this appeal within 20 working days, see 5 U.S.C. § 552(a)(6)(A)(ii) (1976), ITT was deemed to have exhausted its administrative remedies, see *id.* § 552(a)(6)(C). Shortly after ITT filed its complaint the Commission acted on the appeal, refusing to disclose anything further except for factual portions of three documents. ITT World Communications, Inc. On Request for Inspection of Records, 76 F.C.C.2d 453 (1980) [hereinafter cited as "Records Denial"].

⁷⁷ The Commission argued in the district court that the attorney-client privilege, as embodied in Exemption 5, also precluded disclosure. The district court rejected that assertion, stating that the "privilege only attaches when an attorney is performing a service that only an attorney can perform, and the communications between attorney and client are made in confidence. Neither showing has been made here." District Court Opinion at 5 n.2, reprinted in JA at 152. The Commission has not advanced its claim of attorney-client privilege on appeal.

⁷⁸ 5 U.S.C. § 552(a)(4)(B) (1976).

⁷⁹ See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 459-61; Affidavit of H. Russell Frisby, Jr. (Apr. 15, 1980) [hereinafter cited without cross-reference as "Frisby Affidavit"], reprinted in JA at 340-41; Affidavit of Robert E. Gosse (June 2, 1980) [hereinafter cited without cross-reference as "Gosse Affidavit"], reprinted in JA at 343-46; Affidavit of James E. Graf II (June 2, 1980) [hereinafter cited without cross-reference as "Graf Affidavit"], reprinted in JA at 348-54; Affidavit of Sebastian A. Lasher (June 2, 1980) [hereinafter cited without cross-reference as "Lasher Affidavit"], reprinted in JA at 356-58; Affidavit of Elliot Maxwell (June 3, 1980) [hereinafter cited without cross-reference as "Maxwell Affidavit"], reprinted

The fourteen items still being withheld⁸⁰ fall into three broad categories:

(A) Seven items do not pertain directly to the CP meetings, but instead to specific docket proceedings concerning carrier authorizations and facilities planning.⁸¹

(B) Six items are background memoranda and draft statements for the use of commissioners in their contacts with foreign administrations.⁸²

(C) One item is a compilation of staff members' notes reporting the substance of the CP discussions in Dublin.⁸³

The district court granted ITT's motion for summary judgment and ordered the Commission to release all fourteen items. The court's analysis was limited to one short paragraph:

In the instant case, *the FCC cites no specific policy or process in order to protect the documents in question.* In fact, they [sic] consistently defend the Consultative Process as a means of receiving information without having to formulate policy or utilize United States regulatory jurisdiction.... Upholding the use of Exemption 5 in the instant case "would go a long way toward undercutting the entire Freedom of Information Act," ... and detract from the Act's dominant objective of disclosure.... The documents at issue herein must be disclosed.⁸⁴

We have recurrently emphasized that "District Court decisions in FOIA cases must provide statements of law

in JA at 365-67; FCC District Court Memorandum at 10-21, *reprinted in* JA at 500-11.

⁸⁰ After reconsideration, the Commission released item 6. Records Denial, *supra* note 76, 76 F.C.C.2d at 457 n. 10.

⁸¹ Items 4, 9, 11, 12, 13, 14, and 15. *See infra* notes 88-94 and accompanying text.

⁸² Items 2, 3, 5, 7, 8, and 10. *See infra* notes 107-08 and accompanying text.

⁸³ Item 1. *See infra* note 122 and accompanying text.

⁸⁴ District Court Opinion at 6, *reprinted in* JA at 153 (emphasis added) citations omitted).

that are both accurate and sufficiently detailed to establish that the careful *de novo* review prescribed by Congress has in fact taken place.”⁸⁵ Our review of the materials submitted by the Commission leads us to conclude that the district court’s evaluation of the instant items did not reflect the quality of *de novo* review required by this standard. With respect to the documents listed in categories (A) and (B), we accordingly reverse the district court’s disclosure order and remand for additional *de novo* proceedings.⁸⁶ Our decision does not apply to item 7, however, for we conclude that the Commission failed to carry its burden of establishing its right to withhold any of the material therein. Turning to the item listed in category (C), we conclude that the Commission has failed to carry its burden of proof, and we accordingly affirm the district court’s disclosure order with respect to that item.

A. *Material Pertaining to Commission Docket Proceedings*

With one exception, each of these seven items was prepared by staff attorneys or engineering assistants to advise Commission officials on pending docket proceedings.⁸⁷ Item 4 is a legal analysis of the “Applicability of Resale Decision to international communications market,” and gives advice and opinions on the applications of Graphnet and Telenet to extend their services to overseas markets.⁸⁸ Item 9 recommends how the Com-

⁸⁵ *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 950 (D.C.Cir. 1979) (footnote omitted); see also *Marks v. CIA*, 590 F.2d 997, 1010-11 (D.C.Cir. 1978) (Wright, C.J., concurring); *Schwartz v. IRS*, 511 F.2d 1303, 1306-07 (D.C.Cir. 1975).

⁸⁶ We reserve outright, however, with respect to item 2. See *infra* note 116 and accompanying text.

⁸⁷ The exception is item 15, a memorandum from Commissioner Fogarty to Chairman Ferris. See *infra* note 94 and accompanying text. The analysis presented in the text, however, applies with full force to this document. See *infra* notes 96-101 and accompanying text.

⁸⁸ Memorandum from Joel S. Winnik, staff attorney, to Walter R. Hinchman, Chief, Common Carrier Bureau (Aug. 25,

mission should modify the Graphnet authorization to comply with a recent judicial decision.⁸⁹ Item 11 advises a commissioner how he should vote on a proposed authorization of a new transatlantic communications cable.⁹⁰ Item 12 contains similar recommendations regarding Commission authorization of a new communications satellite.⁹¹ Item 13 contains, *inter alia*, recommendations on factors the Commission should consider when ruling on carrier applications, and analyses of issues raised by carriers in pending docket proceedings.⁹² Item 14 analyzes a tariff filing by the American Telephone and Telegraph Company and recommends how the Commission should respond.⁹³ Item 15 contains recommendations on whether the Commission should have a national security briefing by the Department of Defense in connection with a proposed transatlantic cable authorization.⁹⁴

1976). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Gosse Affidavit ¶ F, reprinted in JA at 345-46.

⁸⁹ Memorandum from Sebastian A. Lasher, engineering assistant, to Comm'r Abbott Washburn (Apr. 26, 1979). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Lasher Affidavit ¶¶ 3-5, reprinted in JA at 356-58. The recent decision in question was *ITT World Communications, Inc. v. FCC*, 595 F.2d 897 (2d Cir. 1979). See *supra* note 12.

⁹⁰ Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 7, reprinted in JA at 351.

⁹¹ Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 8, reprinted in JA at 352.

⁹² Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 9, reprinted in JA at 352-53.

⁹³ Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 10, reprinted in JA at 353.

⁹⁴ Memorandum from Comm'r Joseph Fogarty to Chairman Charles Ferris (Oct. 5, 1978). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 11, re-

With respect to these items, the district court's sweeping assertion that "the FCC cites no specific policy or process in order to protect the documents"⁹⁵ is clearly erroneous. The items bear all the indicia of predecisional status.⁹⁶ They were written by subordinate agency personnel to advise Commission officials on issues presented in pending docket proceedings. The authors themselves had no decisionmaking authority; their memoranda were "recommendatory" and "deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another."⁹⁷ The items contain suggestions that could "be freely disregarded";⁹⁸ rather than expressing "the law itself," they simply contain "the ideas and theories which go into the making of the law."⁹⁹ Thus, the deliberative material in these items is without "precedential significance" and cannot be considered "secret law."¹⁰⁰ Finally, the Com-

printed in JA at 353.

⁹⁵ District Court Opinion at 6, reprinted in JA at 153.

⁹⁶ See generally *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 183-90, 95 S.Ct. 1491, 1499-03, 44 L.Ed.2d 57 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54, 159-60, 95 S.Ct. 1504, 1516-18, 1520-21, 44 L.Ed.2d 49 (1975); *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 676-81 (D.C.Cir. 1981); *Brinton v. Department of State*, 636 F.2d 600, 604-06 (D.C.Cir. 1980), cert denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866-69 (D.C.Cir. 1980); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-74 (D.C.Cir. 1978) (en banc); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C.Cir. 1975); S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

⁹⁷ *Coastal States Gas Corp. v. Department of Energy*, supra note 96, 617 F.2d at 866; see also *Arthur Anderson & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C.Cir. 1982).

⁹⁸ *Coastal States Gas Corp. v. Department of Energy*, supra note 96, 617 F.2d at 869.

⁹⁹ *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 708 (D.C.Cir. 1971); see also *Taxation With Representation Fund v. IRS*, supra note 96, 646 F.2d at 678-79.

¹⁰⁰ *Coastal States Gas Corp. v. Department of Energy*, supra note 96, 617 F.2d at 867, 869; see also *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, supra note 96, 421 U.S. at

mission did not expressly adopt any of the material in these items when it issued its final decisions in the relevant proceedings.¹⁰¹

We therefore reverse the district court's judgment ordering the disclosure of items 4, 9, 11, 12, 13, 14, 15. In accordance with previous cases, we remand to the district court for *de novo* factual determinations of two segregability issues.¹⁰²

First, the deliberative process privilege does not protect "purely factual material appearing in ... documents in a form that is severable without compromising the private remainder of the documents."¹⁰³ On remand, the district court must ensure that *only* deliberative material in these items is withheld.

Second, the privilege does not protect material that merely sets forth official agency views and practices with respect to the interpretation and implementation of existing policies.¹⁰⁴ To the extent that some of the material in these items may "embody the agency's effective law and policy,"¹⁰⁵ the district court must be certain that it is excised and released.

These determinations may well require the district court to "examine the contents of [the items] *in camera* to determine whether such records or any part thereof

185-86, 95 S.Ct. at 1500-01; *Taxation With Representation Fund v. IRS*, *supra* note 96, 646 F.2d at 679; *Ryan v. Department of Justice*, 617 F.2d 781, 790-91 (D.C.Cir. 1980).

¹⁰¹ See, e.g., *NLRB v. Sears, Roebuck & Co.*, *supra* note 96, 421 U.S. at 161, 95 S.Ct. at 1521; *Brinton v. Department of State*, *supra* note 96, 636 F.2d at 605.

¹⁰² See, e.g., *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, *supra* note 85, 603 F.2d at 952-53; *Marks v. CIA*, *supra* note 85, 590 F.2d at 1003; *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 262-63 (D.C.Cir. 1977).

¹⁰³ *EPA v. Mink*, 410 U.S. 73, 91, 93 S.Ct. 827, 837, 35 L.Ed.2d 119 (1973). See *infra* notes 124, 126-31, and accompanying text.

¹⁰⁴ See cases cited *supra* note 100.

¹⁰⁵ *NLRB v. Sears, Roebuck & Co.*, *supra* note 96, 421 U.S. at 153, 95 S.Ct. at 1517 (quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U.CHI.L.REV. 761, 797 (1967)).

shall be withheld" under Exemption 5.¹⁰⁶ The court should also take care to provide a sufficiently detailed analysis to enable thorough appellate review.

B. *Material Preparatory to the CP Discussions*

There are six items in this category. Items 2 and 3 are drafts of telexes sent by Commission Chairman Charles Ferris to his Swedish and Canadian counterparts.¹⁰⁷ Items 5, 7, 8, and 10 are background memoranda for the use of commissioners attending the CP meetings, and are generally claimed to contain "recommendations" and "options" on issues to be discussed, and "proposed responses should the parties reject" Commission proposals.¹⁰⁸

¹⁰⁶ 5 U.S.C. § 552(a)(4)(B) (1976).

¹⁰⁷ Item 2 consists of 6 drafts of a telex from Chairman Ferris to Torsten Larsson, Chairman of CEPT/CLTA, Central Administration of Swedish Telecommunications (Oct. 31, 1979). Item 3 is a draft of a telex from Chairman Ferris to Jean-Claude DeLorme, President, Teleglobe Canada (Oct. 31, 1979). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 459-60; Gosse Affidavit ¶ E, *reprinted in* JA at 345. Copies of the final telexes were released. See Records Denial, *supra* note 76, Attachment I, 76 F.C.C.2d at 459; see also JA at 233-35 (reprint of telex to Chairman Larson).

¹⁰⁸ See Gosse Affidavit ¶ G, Graf Affidavit ¶ 6, Maxwell Affidavit ¶ 10, *reprinted in* JA at 346, 351, 367.

Item 5 is a 1-page section of a 28-page memorandum from Robert Gosse and James Warwick, staff attorneys, to FCC attendees of the Dublin Conference (Sept. 1979). The memorandum is entitled "Expansion of Areas of Consultative Contact," and the withheld section consists of recommendations, opinions, and options. See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Gosse Affidavit ¶ G, *reprinted in* JA at 346.

Item 7 is a memorandum from Russell Frisby, attorney-advisor, to James Smith, for FCC attendees of the Dublin Conference (undated). See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Frisby Affidavit, *reprinted in* JA at 340-41.

Item 8 is an undated memorandum prepared by Elliot Maxwell, assistant to Chairman Ferris, for Ferris's use at the Dublin Conference. It consists of proposed remarks that were not delivered, proposals for expanding the consultative process, and proposed responses to possible foreign arguments. See Rec-

ITT argues, and the district court agreed, that because the Commission contends that the CP meetings *themselves* are not deliberative or decisional in nature, material preparatory to the meetings cannot be withheld. We agree that the Commission has engaged in much obfuscation about the substance of these discussions. It has, however, consistently stated that the meetings involve the exchange of information *and views* concerning its competition policy. There is an important distinction between the commissioners' actual statements and the drafts and background memoranda from which those statements emerged. The commissioners' remarks were statements of proposed action¹⁰⁹ and explanations of agency positions¹¹⁰ that, as we discuss below, are not exempt from disclosure.¹¹¹ The instant items, on the other hand, are the raw materials that went into the formulation of those remarks. Like the items discussed in part III-A, they are documents from subordinates to superiors that are merely recommendatory in nature.¹¹² We have held that "internal self-evaluation[s] . . . about the relative merits of various positions which might be adopted" in agency dealings with the public normally fall within the deliberative privilege; this protection extends to "discussion of the merits of past efforts, alternatives currently

ords Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Maxwell Affidavit ¶¶ 3-11, *reprinted in* JA at 365-67.

Item 10 is a memorandum from Angela Shaw, attorney-advisor, to Comm'r Joseph Fogarty (Dec. 16, 1976). Four of the 6 pages were released. The remainder consists of "recommendations regarding the issues to be discussed" at a CP meeting. Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460, Graf Affidavit ¶ 6, *reprinted in* JA at 351.

¹⁰⁹ The closed Dublin meeting for example, was largely devoted to the Commission's proposal to expand the focus of the consultative process. See FCC Brief at 9; Maxwell Affidavit ¶¶ 5, 8-10, *reprinted in* JA at 366-67.

¹¹⁰ See *supra* notes 19-20 and accompanying text.

¹¹¹ See *infra* notes 122-37 and accompanying text.

¹¹² See *supra* notes 96-101 and accompanying text.

available, and recommendations as to future strategy."¹¹³

Moreover, the policies behind the deliberative privilege apply in full force to this advisory material. Disclosure might well discourage subordinates from "provid[ing] . . . their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism."¹¹⁴ Disclosure might also "confus[e] the issues and mislead[] the public by . . . suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action."¹¹⁵

We therefore reverse the district court's disclosure order with respect to most of these items. We have examined the final telex that resulted from the drafts in item 2;¹¹⁶ it consists entirely of policy proposals, and we see no purpose in remanding for further factual findings. With respect to items 3, 5, 8, and 10, however, we remand to the district court for segregability determinations in accordance with our discussion in Part III-A.

We emphasize an important caveat. A consistent assumption running through judicial decisions permitting nondisclosure of deliberative material has been that the *actual* policy or legal positions adopted will be disclosed to the public.¹¹⁷ The district court should be certain

¹¹³ *Mead Data Central, Inc. v. United States Dep't of Air Force*, *supra* note 102, 566 F.2d at 257.

¹¹⁴ *Coastal States Gas Corp. v. Department of Energy*, *supra* note 96, 617 F.2d at 866.

¹¹⁵ *Id.* (citation omitted); *see also Jordan v. United States Dep't of Justice*, *supra* note 96, 591 F.2d at 772-74.

¹¹⁶ *See* Telex from Charles Ferris, Chairman, FCC, to Torsten Larsson, Chairman, CEPT/CLTA, Central Administration of Swedish Telecommunications (Oct. 31, 1979), *reprinted* in JA at 233-35. *See also supra* note 107.

¹¹⁷ *See, e.g., Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, *supra* note 96, 421 U.S. at 184-85, 192, 95 S.Ct. at 1500, 1504; *NLRB v. Sears, Roebuck & Co.*, *supra* note 96, 421 U.S. at 151-52, 159-60, 95 S.Ct. at 1516-17, 1520-21; *Vaughn v. Rosen*, *supra* note 96, 523 F.2d at 1147 n. 38.

that the disclosed documents and other material will provide the public a sufficient view of the Committee's efforts at the CP meetings. If they do not, release of some of the material in these items, to the extent that it reflects positions actually taken, may well be necessary to give the public an adequate understanding of the Committee's activities.

Our decision does not apply to item 7.¹¹⁸ The affidavit submitted by its author stated simply that the document "contained my thoughts on what information would be useful to the Commissioners in discussing" two issues at the Dublin conference.¹¹⁹ This characterization could easily extend to simple summaries of factual information, which, as we discuss below, are not exempt from FOIA disclosure.¹²⁰ The Commission therefore failed to carry its burden of establishing any right to withhold this document,¹²¹ and we affirm the district court's judgment ordering its disclosure.

C. *Material Reporting the CP Discussions*

Item 1 is a compilation of staff members' notes reporting the substance of the closed CP exchange at Dublin.¹²² We affirm the district court's decision that this material must be released.

Communications between agency members and persons from outside the agency generally are not protected by the deliberative process privilege.¹²³ Because

¹¹⁸ For a description of this document, see *supra* note 108.

¹¹⁹ Frisby Affidavit ¶ 3, reprinted in JA at 340-41.

¹²⁰ See *infra* notes 122-34 and accompanying text.

¹²¹ See, e.g., *Coastal States Gas Corp. v. Department of Energy*, *supra* note 96, 617 F.2d at 854, 863-64, 865-66, 870.

¹²² The notes were taken and compiled by two staff attorneys, Robert Gosse and James Warwick. See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 459-60; Gosse Affidavit ¶ D, reprinted in JA at 345.

¹²³ See, e.g., *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1039-41 (1st Cir. 1981); *Mead Data Central, Inc. v. United States Dep't of Air Force*, *supra* note 102, 566 F.2d at 257-58; *Washington Research Project Inc. v. Department of HEW*, 504 F.2d 238, 244-45 (D.C.Cir. 1974), cert. denied, 421 U.S. 963, 95 S.Ct. 951, 44 L.Ed.2d 450 (1975). For

these notes embody such communications, they cannot acquire predecisional status simply by virtue of being circulated within the agency. Moreover, reports of extra-agency discussions are factual in nature; courts have long emphasized that factual material usually is not exempt from disclosure.¹²⁴ And unlike the background evaluative material discussed above, commissioners' comments that may be reported in these notes are actual explanations of the Commission's policies and actions. Although the public has only a marginal interest in the release of inter-Commission material debating positions to be taken at international conferences, it has a substantial interest in knowing the positions that Committee members actually take.¹²⁵

The Commission advances three rationales against disclosure. First, it argues that "[s]uch notes are evaluative, because the persons making them were not secretaries or other neutral observers, but were FCC staff attorneys, who can be expected to write down only those comments made by speakers at the meeting that they feel are significant."¹²⁶ This argument is similar to one we recently considered—and rejected—in *Playboy Enterprise, Inc. v. Department of Justice*.¹²⁷ In that case, the government argued that a Justice Department investigative report reflected the "choice, weighing and analysis of facts," and was therefore pro-

exceptions, see, e.g., *Forsham v. Harris*, 445 U.S. 169, 182-86, 100 S.Ct. 978, 985-87, 63 L.Ed.2d 293 (1980); *Ryan v. Department of Justice*, 617 F.2d 781, 789-91 (D.C. 1980); and *Soucie v. David*, 448 F.2d 1067, 1078 n. 44 (D.C.Cir. 1971), all dealing with advisory material solicited from outside consultants as part of the deliberative process.

¹²⁴ See *EPA v. Mink*, *supra* note 103, 410 U.S. at 89-81, 93 S.Ct. at 836-37; *Brinton v. Department of State*, *supra* note 96, 636 F.2d at 604-06. For exceptions, see *infra* notes 130-31 and accompanying text.

¹²⁵ Material pertaining to foreign and defense affairs may be withheld if properly classified pursuant to executive order. See 5 U.S.C. § 552(b)(1) (1976). This exemption is not at issue in the instant litigation.

¹²⁶ DOJ Brief at 32.

¹²⁷ 677 F.2d 931 (D.C. Cir. 1982).

tected from disclosure by the deliberative privilege.¹²⁸
We responded:

Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.¹²⁹

Like *Playboy Enterprises*, this case is distinguishable from suits seeking disclosure of staff summaries of record evidence in adjudicatory and rulemaking proceedings.¹³⁰ The courts in such cases have found that, where analyses are prepared for the sole purpose of evaluating the relative factual merits of different positions in pending proceedings, disclosure would invite "probing [of] the decision-making process itself."¹³¹ Here, on the other hand, the Commission has cited no specific pending proceeding for which the notes were compiled, and in any event it has presented no evidence that the notes are evaluative in nature rather than straightforward factual narrations.

The Commission argues, however, that the notes "may be used by the staff in making recommendations to the Commissioners concerning future consultative meetings."¹³² We have rejected this sort of sweeping argument before. Such an interpretation would "swal-

¹²⁸ *Id.* at 935.

¹²⁹ *Id.*

¹³⁰ See, e.g., *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70 (2d Cir. 1979) (summaries of evidence in rulemaking proceedings); *Montrose Chem. Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974) (summaries of evidence in adjudicatory proceedings).

¹³¹ *Montrose Chem. Corp. v. Train*, *supra* note 130, 491 F.2d at 68 ("Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not prove his deliberative process.") (footnote omitted); see also *Lead Indus. Ass'n, Inc. v. OSHA*, *supra* note 130, 610 F.2d at 83-84.

¹³² DOJ Brief at 33 (quoting Gosse Affidavit ¶ D, *reprinted in* JA at 345).

low up a substantial part of the administrative process" and "would result in a huge mass of [factual] material being forever screened from public view."¹³³ It is not enough for an agency to assert that factual material "may be used" in future deliberations; the agency must demonstrate that the material at issue is inextricably intertwined with a *specific* deliberative proceeding.¹³⁴

Finally, the Commission asserts that these notes are protected by the "related governmental privilege" that protects "information provided to the government by persons who would not provide information unless given a promise of confidentiality."¹³⁵ We need not consider the scope of this exemption,¹³⁶ however, for the Commission provided no evidence to the district court that confidential treatment had actually been promised to the foreign participants or that the foreigners would not otherwise have met with the Committee to discuss the Commission's competition policy.¹³⁷

IV. THE SUNSHINE ACT COUNT

The Government in the Sunshine Act is grounded on the principle that "the public is entitled to the fullest practicable information regarding the decisionmaking

¹³³ *Vaughn v. Rosen*, *supra* note 96, 523 F.2d at 1145-46.

¹³⁴ The Commission's reliance on *Brinton v. Department of State*, *supra* note 96, 636 F.2d 600, is misplaced. The court in that case exempted the disputed memoranda from disclosure even though they did not relate to a specific decision, but the material therein was analytical and recommendatory, not factual.

¹³⁵ DOJ Brief at 32.

¹³⁶ For its previous application, see, e.g., *Merrill v. Federal Open Mkt. Comm.*, 565 F.2d 778, 786 (D.C. Cir. 1977), *vacated on other grounds*, 443 U.S. 340, 99 S.Ct. 2800, 61 (L.Ed.2d 587 (1979); *Brockway v. Department of Air Force*, 518 F.2d 1184, 1193 (8th Cir. 1975).

¹³⁷ The Commission simply asserts in a conclusory manner that "[t]he prospect of disclosure would, in our view, tend to discourage these candid exchanges. . . ." Records Denial, *supra* note 76, 76 F.C.C.2d at 458. See also *infra* note 179 and accompanying text.

processes of the Federal Government."¹³⁸ Accordingly, the Act requires that all meetings of multi-member agencies be open to public observation.¹³⁹ Meetings may be closed, however, where they would likely involve the discussion of information protected from disclosure under one or more of ten narrowly defined exemptions.¹⁴⁰

The sole question presented in this count is whether the consultative process exchanges are "meetings" within the meaning of the Act. On cross-motions for summary judgment, the district court held that they are. We conclude that there are no genuine issues of material fact and we affirm. The public may therefore be excluded from these discussions only in accordance with the Act's stringent closure provisions.

The Sunshine Act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."¹⁴¹ Under the Act, the Commission bears the burden of demonstrating that this definition does not en-

¹³⁸ Government in the Sunshine Act, § 2, Pub. L. No. 94-409, 90 Stat. 1241, 1241 (1976).

¹³⁹ 5 U.S.C. § 552b(b) (1976). An "agency" is any agency as defined in FOIA, *id.* § 552(e), that is "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." *Id.* § 552b(a)(1).

¹⁴⁰ *Id.* § 552b(c)(1)–(10).

¹⁴¹ *Id.* § 552b(a)(2). The ambiguity of this definition has frequently been noted. *See, e.g.,* R. BERG & S. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 3-4 (1978) ("Defining the scope of the term 'meeting' is one of the most troublesome problems in interpreting and applying the Sunshine Act. The definition was revised frequently during the course of the legislative process, sometimes for obscure reasons, and the legislative history is not completely consistent.") (footnote omitted).

compass the CP discussions.¹⁴² It has advanced three arguments, which we consider in turn.

A. *The Authorization Requirement*

To be a meeting covered by the Sunshine Act, a gathering must include "at least the number of individual agency members required to take action on behalf of the agency."¹⁴³ This language requires the presence of *either* a quorum of the full agency *or* a quorum of a "subdivision . . . authorized to act on behalf of the agency."¹⁴⁴ Although it is undisputed that a quorum of the Telecommunications Committee attends the CP exchanges, the Commission argues that it has not "authorized" the Committee to "act" on its behalf at the discussions. Because such an authorization could only be accomplished through an express delegation of power pursuant to 47 U.S.C. § 155(d)(1) (1976),¹⁴⁵ the Commission contends, the threshold requirement of an authorized quorum has not been met.

We disagree. The applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will. The Commission concedes in the instant case that (1) Committee members

¹⁴² 5 U.S.C. § 552b(h)(1) (1976).

¹⁴³ *Id.* 552b(a)(2).

¹⁴⁴ H.R. REP. No. 880 (Part 1), 94th Cong., 2d Sess. 7 (1976), U.S. Code Cong. & Admin. News 1976, pp. 2183, 2189 [hereinafter cited as "House Report I"]; S. REP. No. 354, 94th Cong., 1st Sess. 17, 19 (1975) [hereinafter cited as "Senate Report"]. See also 5 U.S.C. § 552b(a)(1) (1976) ("agency" includes "any subdivision thereof authorized to act on behalf of the agency").

¹⁴⁵ That section provides that "the Commission may, by published rule or by order, delegate any of its functions . . . to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter . . ." We discuss the delegation question *infra* Part V-C.

attend CP exchanges in their "official roles";¹⁴⁶ (2) their goal is to build a "consensus" that will "lead ultimately to operating agreements for ITT's competitors";¹⁴⁷ and (3) they convey the information and views "exchanged" at the meetings to the full Commission for its consideration.¹⁴⁸ Indeed, the Commission insists in its rulemaking denial that the Committee's participation in the meetings is necessary for the Commission to carry out its statutory duty to regulate international communications.¹⁴⁹ Whatever the actual scope of the Committee's endeavors, there can therefore be no question that they are undertaken "on behalf of" the Commission.

B. *"Conduct or Disposition of Official Agency Business"*

A more difficult question is whether the Committee's efforts are "deliberations [that] determine or result in the joint conduct or disposition of official agency business."¹⁵⁰ The statutory language is ambiguous. "Deliberations" might be read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency. On the other hand, "conduct . . . of official agency business" suggests a much broader range of activity, including, *inter alia*, hearings and meetings with outsiders.

The Commission advances three arguments based on the statutory language and the legislative history, in support of the narrow interpretation.

1. *"Official Agency Business"*

The Commission argues that the Committee does not transact "official agency business" at the meetings; members participate solely to "exchange information

¹⁴⁶ DOJ Brief at 24; see also *supra* notes 23, 37-39, and accompanying text.

¹⁴⁷ See *supra* notes 24-25 and accompanying text.

¹⁴⁸ DOJ Brief at 24; see also Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883.

¹⁴⁹ See *supra* notes 37-39 and accompanying text.

¹⁵⁰ 5 U.S.C. § 552b(a)(2) (1976).

and views," and not to vote, "negotiate," or otherwise engage in a "'rump' FCC meeting."¹⁵¹ The Reports of the House and Senate Committees on Government Operations, however, clearly demonstrate that "official agency business" encompasses far more than simply "agency actions" of the sort reviewable under the APA.¹⁵² The Senate Report, for example, states that "[i]n addition to business meetings of the agency," the definition of covered meeting "includes *hearings and meetings with the public*."¹⁵³ Similarly, both Reports indicate that subdivisions are covered by the Act where they are "authorized to submit recommendations, . . . or to conduct hearings on behalf of the agency."¹⁵⁴ So long as hearings and meetings with outsiders result in the actual conduct of official business, agencies cannot avoid the openness requirements where they are otherwise subject to the Act.

The Commission has advanced no reason to distinguish the discussions at issue from "hearings" or "meetings with the public." There can be no question, moreover, that the closed discussions involve agency business of the first import. These encounters play an integral role in the Commission's policymaking processes in at least two ways. First, the Commission has emphasized that the meetings are an important means for gathering information and opinions from foreign ad-

¹⁵¹ DOJ Brief at 24; see also Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883-84, 886.

¹⁵² Compare 5 U.S.C. § 551(13) (1976). See House Report I, *supra* note 144, at 8; see also *Pacific Legal Found. v. Council on Env'tl. Quality*, 636 F.2d 1259, 1264-65 (D.C.Cir. 1980) (formulating and rendering advice to the President is official agency business).

¹⁵³ Senate Report, *supra* note 144, at 18 (emphasis added). See also H.R. REP. NO. 1441 & S.REP. NO. 1178, 94th Cong., 2d Sess. 11, U.S. Code Cong. & Admin. News 1976, p. 2183 (1976) (adopting "the Senate definition, as explained in the Senate report") [hereinafter cited as "Conference Report"].

¹⁵⁴ House Report I, *supra* note 144, at 7, U.S. Code Cong. & Admin. News 1976, p. 2189; Senate Report, *supra* note 144, at 17.

ministrations, and that this material is essential in its deliberations regarding the future structure of international telecommunications.¹⁵⁵ The act extends to subdivisions' activities that result in the submission of "recommendations," and we agree with the district court that the Commission has failed to rebut the common-sense presumption that the Committee's activities are, at least in part, evaluative and recommendatory in nature.¹⁵⁶ Second, the success of the Commission's established competition policy depends on its achieving a "consensus" and "favorable climate" with foreign administrations,¹⁵⁷ and the agency has chosen the CP as the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements. The broad sweep of the Sunshine Act does not support a distinction between an agency's *predecisional* activities and its *postdecisional* efforts to implement, interpret, and promote its policies. Both are important components of "official agency business."

2. Meetings "of" the Agency

The Commission argues, however, that the CP discussions are not meetings *of* the Committee, but simply meetings attended *by* the Committee. Put another way, the discussions do not involve the "joint" conduct of business *among* Committee members, but rather exchanges *between* the Committee and outside parties.

¹⁵⁵ See Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883 ("The Consultative Process . . . provides a valuable if not indispensable source of information . . . because it facilitates our predictive judgment as to future foreign communications needs and the solutions to those needs that will be acceptable to other countries. . . ."); see also *supra* notes 37-39 and accompanying text; sources cited *supra* note 16.

¹⁵⁶ District Court Opinion at 7, *reprinted in* JA at 154. Our conclusion is buttressed by the Commission's contradictory argument in the FOIA count that documents generated from the meetings are predecisional materials. See *supra* notes 122, 126, 132, and accompanying text.

¹⁵⁷ See *supra* notes 24-25 and accompanying text.

Again, this argument fails to overcome the presumption that agency hearings and meetings with outsiders be open to public observation. An agency cannot avoid this requirement through the facile expedient of having an outside party "hold" the discussion, for the Sunshine Act's policy that hearings and meetings with the public be open could otherwise be ignored with impunity.¹⁵⁸

Moreover, the intended meaning of the phrase "joint conduct" offers the Commission little comfort. The House Report emphasizes that the phrase "does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business."¹⁵⁹ Rather, the phrase was intended to exempt solely those situations "where the requisite number of members is physically present in one place but not conducting agency business as a body."¹⁶⁰ Both the House and Senate Reports cite as an example a gathering where one member gives a speech concerning agency business while other members are in the audience.¹⁶¹ The instant situation is readily distinguishable. The full Committee meets with its foreign counterparts, and the record shows that all members are active participants in the give-and-take.¹⁶²

¹⁵⁸ The Senate Report emphasizes that "the mere setting of the gathering is not determinative [M]eetings outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the requirements of this subsection. The test is what the discussion involves, not where or how it is conducted." Senate Report, *supra* note 144, at 18-19.

¹⁵⁹ House Report I, *supra* note 144, at 8, U.S. Code Cong. & Admin. News 1976, p. 2190.

¹⁶⁰ *Id.*; see also Senate Report, *supra* note 144, at 18.

¹⁶¹ House Report I, *supra* note 144, at 8; Senate Report, *supra* note 144, at 18. The Senate Report states that the phrase "also excludes instances where a single agency head, authorized to conduct a meeting on behalf of the agency, or to take action on behalf of the agency, meets with members of the public, or staff." Senate Report, *supra* note 144, at 18.

¹⁶² We note in passing that the Commission's Sunshine Act regulations define a "meeting" as "the deliberations among a quorum of the Commission, a Board of Commissioners, or a quo-

3. "Informal Background Discussions"

The Commission relies heavily on a statement in the Senate Report that "[i]t is not the intent of the bill to prevent any two agency members, regardless [sic] of agency size, from engaging in informal background discussions which clarify issues and expose varying views."¹⁶³ The Commission contends that the CP meetings are precisely the sort of discussions that Congress intended to exclude by this language. We conclude that this passage from the Senate Report, read in context, does not support the Commission's position.

The definition of a "meeting" was recurrently revised during the course of the legislative process.¹⁶⁴ Many members of Congress, both supporters and opponents of the Act, were particularly concerned that the evolving definition might mechanically be extended to informal discussions among members that did not truly constitute the "conduct" of agency business. Examples cited included passing references to agency business at social gatherings,¹⁶⁵ casual background conversations in

rum of a committee of Commissioners." 47 C.F.R. § 0.601(b) (1981) (emphasis added). To the extent that the word "among" may be designed to exempt hearings on meetings with the public that result in the conduct of official agency business, its use violates Congress's intent. See *supra* notes 151-61 and accompanying text.

¹⁶³ Senate Report, *supra* note 144, at 19. The reference is to informal discussions between two members of a three-member agency; the passage "necessarily has broader application," exempting such discussions among a quorum of members, regardless of agency size. R. BERG & S. KLITZMAN, *supra* note 141, at 6.

¹⁶⁴ See Appendix C of R. BERG & S. KLITZMAN, *supra* note 141, at 116-17, for a chronological chart of the evolving definition of "meeting."

¹⁶⁵ House Report I, *supra* note 144, at 35 (additional views of Rep. Horton); H.R.REP. NO. 880 (Part 2), 94th Cong., 2d Sess. 38 (1976) (additional views of Reps. Moorhead & Kindness) [hereinafter cited as "House Report II"]; 122 CONG.REC. 24,183 (1976) (remarks of Rep. Horton); *id.* at 24,188-89 (remarks of Rep. McCloskey).

offices and corridors,¹⁶⁶ banter on the golf course,¹⁶⁷ and breakfast or luncheon discussions among members about the day's business.¹⁶⁸

Although many legislators felt that the phrase "conduct . . . of official agency business" by *definition* excludes such encounters,¹⁶⁹ the language cited by the Commission was inserted into the Senate Report to ensure that discussions of this sort were not construed as actual meetings. The Report emphasizes that the line between these kinds of informal encounters and those amounting to the actual conduct or disposition of agency business is fine, and it reiterates that the Act's presumption of openness requires that all doubts be resolved against closure.¹⁷⁰

The thrust of the language in the Senate Report therefore concerns "informal background discussions" *among* agency members rather than *between* members and outsiders.¹⁷¹ Although we believe that the Sun-

¹⁶⁶ 122 CONG. REC. 24,189-90 (1976) (remarks of Rep. McCloskey); *id.* at 24,193 (remarks of Rep. Ashley).

¹⁶⁷ *Id.* at 24,189 (remarks of Rep. McCloskey); *id.* at 24,203 (remarks of Rep. Horton).

¹⁶⁸ *Id.* at 24,203 (remarks of Rep. McCloskey).

¹⁶⁹ *See, e.g., id.* at 24,193 (remarks of Rep. Collins); *id.* at 24,203 (remarks of Rep. Brooks); *id.* at 24,204 (remarks of Rep. Abzug); *id.* (remarks of Rep. Flowers).

¹⁷⁰ Senate Report, *supra* note 144, at 19.

¹⁷¹ *See also* R. BERG & S. KLITZMAN, *supra* note 141, at 8 (Senate Report's language excludes "briefings to" and "exploratory talks *among* agency members") (emphasis added); *id.* at 8 n. 13 (citing agency regulations). The Department of Justice has in the past interpreted "meeting" to include "a 'briefing session' attended by at least the number of agency members required to take action on behalf of the agency, where the members attending have an opportunity to ask questions or seek clarification of matters of concern." Department of Justice Letter to Covered Agencies (Apr. 19, 1977), *reprinted in* R. BERG & S. KLITZMAN, *supra* note 141, at 120-21 (Appendix E).

The Conference Committee's substitution of the phrase "determine or result in" for the word "concern," *see* Conference Report, *supra* note 153, at 11, also supports this reading. *See* 122 CONG. REC. 28,474 (1976) (remarks of Rep. Fascell) ("This

shine Act does not *per se* forbid all informal off-the-record discussions between a quorum of an agency and outside parties, we conclude that an agency's burden of persuasion must be especially great in such situations. Congress intended that "hearings" and "meetings with the public" be open; many such gatherings could easily be characterized as "informal background discussions which clarify issues and expose varying views." If we did not apply the narrowest of interpretations to this language, it would readily swallow up the requirement of open "hearings" and "meetings with the public."

In the instant case, the Commission has failed to overcome the presumption in favor of openness. The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members,¹⁷² but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the communications industry. They are, in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."

C. Policy Arguments

The Commission invokes a number of "adverse practical consequences" that would allegedly result from extending the Sunshine Act to the consultative process.¹⁷³

language is intended to permit casual discussions *between agency members* that might invoke the bill's requirements under the less formal 'concern' standard.") (emphasis added).

¹⁷² See 122 CONG. REC. 24,204 (1976) (remarks of Rep. Abzug); *supra* notes 165-68, 171, and accompanying text.

¹⁷³ The Commission argues, for example, that it initiated the closed meetings "because [we] recognized the need for a neutral forum for talks which did not create the impression that the Europeans were subject to U.S. regulatory processes." FCC Brief at 30 n. 24. Affirmance of the district court's judgment, the Commission warns, "would be inconsistent with the desired impression." *Id.* See also DOJ Brief at 25-26; Demory Affidavit ¶ 8

These difficulties, the Commission argues, demonstrate that—"at least in the absence of a clear statement by Congress"—the Act should not be interpreted to cover meetings between an agency and its foreign counterparts.¹⁷⁴

The absence of a clear statement by Congress, however, cuts in the other direction.¹⁷⁵ The Sunshine Act's presumption in favor of open meetings is sweeping and, with the exception of enumerated exemptions, unqualified. The Commission points to nothing in the history or structure of the Act to indicate that Congress intended *sub silentio* to permit the closure of agency meetings simply because foreign representatives are present.

Moreover, the Act permits agencies to close meetings that likely would involve the discussion of information exempted from disclosure under 5 U.S.C. § 552b(c) (1976); the district court specifically invited the Commission to take advantage of this provision. For example, section 552b(c)(9) permits an agency to close meetings involving "information the premature disclosure of which would . . . be likely to frustrate implementation of a proposed agency action." Similarly, section 552b(c)(1) permits closure where discussions would involve national defense or foreign policy information that is exempt "under criteria established by an Executive order."¹⁷⁶ Thus, Congress fully recognized that certain meetings should not be open to public scrutiny. As we have emphasized, however, "[t]he means Congress chose to accomplish this objective, . . . was to permit an agency to close a *particular* meeting on an

("The Europeans appreciate the opportunity to communicate with us directly and prefer this to [discussions] through diplomatic channels. In my opinion, the District Court's order will limit this direct contact and will have a decidedly negative impact on our relations with foreign administrations."), *reprinted in* DOJ Brief at 4a.

¹⁷⁴ DOJ Brief at 26.

¹⁷⁵ See, e.g., 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.23-.25 (4th ed. 1973 & 1982 Cum.Supp.).

¹⁷⁶ We express no views as to whether either of these exemptions could properly be invoked to close the CP discussions.

individual basis because of the adverse impact public proceedings would be likely to have upon the rights of individuals and the ability of the government to function properly.”¹⁷⁷ Rather than acting upon an “individual and particularized basis,”¹⁷⁸ the Commission has sought to exempt an entire category of its business from the requirements of the Sunshine Act. We therefore reject the Commission’s restrictive interpretation of “meetings” covered by the Act.¹⁷⁹

V. THE RULEMAKING DENIAL

We turn finally to the Commission’s order denying ITT’s petition for rulemaking. Our scope of review is defined by 5 U.S.C. § 706(2) (1976), which requires

¹⁷⁷ *Pacific Legal Found. v. Council on Envtl. Quality*, *supra* note 152, 636 F.2d at 1265.

¹⁷⁸ *Id.*

¹⁷⁹ The Commission on appeal has relied heavily on the Lee and Demory affidavits, *see supra* notes 19, 25, in support of its characterization of the closed CP sessions. Neither affidavit was submitted until after the district court had rendered its decision. We look with great disfavor on such *post hoc* attempts to supplement the record. *See, e.g., Coastal States Gas Corp. v. Department of Energy*, *supra* note 96, 617 F.2d at 859 n.6. In any event, the affidavits are vague, conclusory, and contradictory. Lee’s affidavit, for example, largely parrots the language of the statute and legislative history. *See* Lee Affidavit ¶ 3 (Lee did not “take any action on behalf of the Commission,” “submit ... recommendations,” or “conduct any hearings at such meetings on behalf of the agency”), *reprinted in* JA 587-88. Lee’s assertions also flatly contradict the Commission’s conceded purpose for holding the meetings. *Compare id.* (Lee did not “seek to have the participants ... agree to ... take any specific actions regarding any particular telecommunications policies”), *reprinted in* JA at 588, with *supra* notes 24-25 and accompanying text. Similarly, Demory’s affidavit alleges in conclusory terms that the CP meetings “must be off the record” if they are “to be truly useful in providing a vigorous exchange of views.” Demory Affidavit ¶ 5, *reprinted in* DOJ Brief at 3a. In line with FOIA decisions, we believe that such conclusory affidavits, even if properly considered at this juncture, are wholly inadequate to sustain the Commission’s burden of proof. *See Coastal States Gas Corp. v. Department of Energy*, *supra* note 96, 617 F.2d at 861.

that we "hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁸⁰

We have noted that the arbitrary and capricious standard is not "a fixed template to be imposed mechanically on every case,"¹⁸¹ but instead requires calibration in accordance with the nature and context of the challenged action. Where an agency promulgates rules, our standard of review is "diffident and deferential,"¹⁸² but nevertheless requires a "searching and careful" examination of the administrative record to ensure that the agency has fairly considered the issues and arrived at a rational result.¹⁸³ Where, as here, an agency chooses *not* to engage in rulemaking, our level of scrutiny is even more deferential: "It is only the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment, not to institute rulemaking"¹⁸⁴ This added measure of deference, however, is appropriate only where the rejected proposal is addressed to matters within the agency's broad policy discretion.¹⁸⁵ Where a rulemaking petition

¹⁸⁰ 5 U.S.C. § 706(2)(A) (1976). See also *id.* § 706(2)(C)-(D) (reviewing court must set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law").

¹⁸¹ *Natural Resources Defense Council, Inc. v. SEC*, *supra* note 67, 606 F.2d at 1049.

¹⁸² *Id.* (footnote omitted).

¹⁸³ *Citizens, to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971). See generally *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 34-36 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-94 (D.C.Cir. 1973), *cert. denied*, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974).

¹⁸⁴ *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C.Cir. 1981).

¹⁸⁵ See, e.g., *id.* at 819-20 (denial of rulemaking petition *re* regulation of local subscription television stations); *Natural Resources Defense Council, Inc. v. SEC*, *supra* note 67, 606 F.2d at 1046, 1049, 1053 (same *re* corporate disclosure of environ-

challenges an agency's compliance with substantive and procedural norms, on the other hand, our standard of review must perforce be "exacting" to ensure that the agency has "scrupulously" followed the law.¹⁸⁶

ITT's rulemaking petition involves both issues of discretion and questions of compliance with statutory and procedural commands. The Commission has considerable discretion, beyond the statutory minima, in fashioning rules for public participation in its processes.¹⁸⁷ Some of ITT's proposals go well beyond minimum statutory requirements, and the Commission might reasonably conclude that they are cumbersome and counterproductive.¹⁸⁸ On the other hand, many of the issues presented in the rulemaking petition call into question the Commission's compliance with the Communications Act, the APA, and the Sunshine Act. Our review of its disposition of these issues must be "thor-

mental and equal employment policies); *Action for Children's Television v. FCC*, 564 F.2d 458, 479-80 (D.C.Cir. 1977) (same re television programming for children).

¹⁸⁶ *Natural Resources Defense Council, Inc. v. SEC*, *supra* note 67, 606 F.2d at 1048, 1053 (agency compliance with National Environmental Policy Act); *see also Geller v. FCC*, 610 F.2d 973, 978-80 (D.C.Cir. 1979) (*per curiam*) (agency refusal to consider effect of new legislation on earlier regulations); *NAACP v. FPC*, 520 F.2d 432, 435-46 (D.C.Cir. 1975) (agency jurisdiction), *aff'd*, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976); *National Org. for Reform of Marijuana Laws (NORML) v. Ingersoll*, 497 F.2d 654, 659 (D.C.Cir. 1974) (scope of agency authority).

¹⁸⁷ *See, e.g., Vermont Yankee Nuclear Power Corp., Inc. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 98 S.Ct. 1197, 1211-13, 55 L.Ed.2d 460 (1978); *American Trucking Ass'ns v. United States*, 627 F.2d 1313, 1321 (D.C.Cir. 1980).

¹⁸⁸ The Commission so argues on appeal, *see FCC Brief* at 26-27, but the proposal's "unworkability" did not form the basis for the Commission's rulemaking denial. *See Rulemaking Denial*, *supra* note 7, 77 F.C.C.2d at 887-88. Indeed, the Commission seems to have believed that the proposals are generally sound, for it promised to follow most of them, albeit without the adoption of formal regulations, in future CP meetings. *Id.* at 888.

ough, probing, [and] in-depth";¹⁸⁹ the Commission's explanation and the evidence it marshalls "must be such as to enable [us] to determine with some measure of confidence whether or not the [actions are] arbitrary [or] capricious."¹⁹⁰

Applying these standards, we reverse the Commission's rulemaking denial in part, and remand the remaining issues for further consideration in accordance with our discussion below.

A. *The Sunshine Act*

For the reasons set forth in Part IV, the CP discussions are "meetings" within the meaning of the Sunshine Act, and are therefore governed by the Act's stringent closure provisions. In its rulemaking denial, however, the Commission concluded that these exchanges fall outside of the Sunshine Act's ambit.¹⁹¹ This determination is not in accordance with law, and we therefore reverse this part of the Commission's order.

B. *The Commission's Authority*

The Commission's assessment of the scope of its authority deserves deference.¹⁹² Before we can sanction the Commission's course of conduct, however, we must ascertain the nature of its actions, its reasons for the actions, and whether those actions comport with the Communications Act and the APA.¹⁹³ The Commission's explanations and the "record" it has assembled are patently inadequate for such a determination.¹⁹⁴

¹⁸⁹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra* note 183, 401 U.S. at 415, 91 S.Ct. at 823.

¹⁹⁰ *Dunlop v. Bachowski*, 421 U.S. 560, 571, 95 S.Ct. 1851, 1859, 44 L.Ed.2d 377 (1975) (citation omitted).

¹⁹¹ See *supra* notes 40-41 and accompanying text.

¹⁹² See *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969).

¹⁹³ See, e.g., *Dunlop v. Bachowski*, *supra* note 190, 421 U.S. at 571, 95 S.Ct. at 1859; *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra* note 183, 401 U.S. at 419-20, 91 S.Ct. at 825; cases cited *supra* note 186.

¹⁹⁴ "Record" is something of a misnomer, as the Commission chose not to conduct rulemaking. The "record" here consists

We are asked, in essence, to approve of actions about which we know almost nothing. The record consists simply of the Commission's assertions that it has not negotiated, and of numerous statements by agency members that would appear to undercut these assertions. Self-serving representations are no substitute for an adequate record that would enable us to determine with confidence the actual scope of the Commission's endeavors. By refusing to develop any such record of its contacts with foreign administrations, the Commission has frustrated meaningful judicial review of its rulemaking denial.¹⁹⁵

The Commission argues, however, that no record is required because (1) no one is prejudiced by the informal, off-the-record meetings, and (2) no reviewable "agency action" occurs at the meetings. This argument must be rejected. ITT has pointed to a number of factors that raise serious questions about the Commission's claim that no "agency action" occurs in connection with the consultative process.¹⁹⁶ This court certainly has authority to determine whether activities engaged in by the Commission are subject to judicial review; the circular claim that these activities are unreviewable makes such a determination impossible.

In addition to the paucity of the record, several additional "danger signals" suggest that the Commission may not have engaged in "reasoned decision-making" in its rulemaking denial.¹⁹⁷ First, ITT pointed to a num-

simply of the petition, comments, and denial. The Commission has argued, however, that "[t]his case has an administrative record more than amply detailed enough to permit this Court to review the agency decision in a routine manner." DOJ Brief at 14.

¹⁹⁵ See, e.g., *Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973); *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 532-33 (D.C.Cir. 1978); *Moss v. CAB*, *supra* note 66, 430 F.2d at 900.

¹⁹⁶ See *supra* notes 22-26, 66, and accompanying text.

¹⁹⁷ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

ber of statements by agency officials that would appear to contradict the Commission's characterization of the CP meetings as mere "information exchanges."¹⁹⁸ In its order, however, the Commission failed completely to acknowledge these statements or to explain the apparent contradictions.¹⁹⁹ Second, the Commission dismissed ITT's *ex parte* and prejudgment claims as "theoretical" and "speculative, for in the absence of a pending proceeding, be it formal or informal, [such] questions . . . simply do not exist."²⁰⁰ Reference to the Commission's FOIA materials, however, suggests that a number of pending docket proceedings have in fact been discussed at the CP meetings.²⁰¹ Finally, there is evidence suggesting that the rulemaking denial was crafted in part to enhance the Commissioner's litigation posture in the district court action.²⁰²

¹⁹⁸ See, e.g., Rulemaking Petition at 5, *reprinted in* JA at 20; Reply Comments of ITT World Communications, Inc., at 3-4 (Jan. 8, 1980) *reprinted in* JA at 118-19. See also *supra* notes 22-26 and accompanying text.

¹⁹⁹ See, e.g., *Home Box Office, Inc. v. FCC*, *supra*, note 183, 567 F.2d at 35-36 & n. 58; *Portland Cement Ass'n v. Ruckelshaus*, *supra* note 183, 486 F.2d at 393-94.

²⁰⁰ Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 887-88.

²⁰¹ See Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460 (items 5, 7, 8 and 10); Frisby Affidavit ¶ 3, *reprinted in* JA at 340-41. See also Rulemaking Petition at 9-10 (listing open docket proceedings), *reprinted in* JA at 24-25.

²⁰² See *Transcript of FCC Open Meeting*, at 1 (Apr. 22, 1980) (remarks of David Bass concerning preliminary draft of rulemaking denial) ("We do have some changes to make in the draft before you now both on our undertaking and at the suggestion of the General Counsel's Office to strike from this order and help it coordinate with the collateral court suit that ITT has filed in the District Court. . . ."), *reprinted in* JA at 135. See also the colloquy between Commissioner Abbott Washburn and General Counsel Robert Bruce, *id.* at 6, *reprinted in* JA at 140:

Washburn: Why do we have to address this here, Mr. Chairman. Why can't we get at it in some other context. Let's get rid of this tiem [*sic*] without addressing this matter at this point.

Bruce: Commissioner Washburn, I think it's probably useful that we deal with this petition at this time because of the pending litigation in the District Court.

On the basis of the Commission's statement and the record before us, we therefore cannot sustain the Commission's characterization of its actions, its conclusion that these actions are authorized, or its rejection of *all* APA safeguards. We must therefore remand the order to the Commission.

Our normal course would simply be to instruct the Commission to consider the issues further and develop an adequate record for judicial review.²⁰³ In the instant case, however, we also have a district court action that is simultaneously being remanded for *de novo* proceedings on the *ultra vires* issue.²⁰⁴ To the extent that there is tension in such a "double remand," it is largely of the Commission's own making. As discussed in Part II-A, the issues raised by the *ultra vires* count are distinct from those presented in the rulemaking denial.²⁰⁵ District court scrutiny, moreover, is appropriate in large measure because the consultative process has taken place outside of normal administrative channels, thereby necessitating *de novo* factfinding.²⁰⁶ At the same time, the necessity for district court intervention does not lessen the degree of scrutiny we apply to the Commission's rulemaking denial,²⁰⁷ and in no way excuses the Commission's failure to generate a contemporaneous administrative record of the consultative process.²⁰⁸

Nevertheless, we are concerned that the practical effect of our decision is fraught with the potential for duplication, conflicting resolutions, and further delay. The Commission may avoid these difficulties through the simple expedient of staying further action on ITT's

²⁰³ See, e.g., *Camp v. Pitts*, *supra* note 195, 411 U.S. at 143, 93 S.Ct. at 1244; *United States Lines, Inc. v. Federal Maritime Comm'n*, *supra* note 195, 584 F.2d at 532-33; *Greater Boston Television Corp. v. FCC*, *supra* note 197, 444 F.2d at 850.

²⁰⁴ See *supra* Part II-A.

²⁰⁵ See *supra* notes 50-51 and accompanying text.

²⁰⁶ See *supra* notes 52-54 and accompanying text.

²⁰⁷ See *supra* notes 181-90, 192-202, and accompanying text.

²⁰⁸ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra* note 183, 401 U.S. at 420, 91 S.Ct. at 825.

rulemaking petition pending the district court's resolution of the *ultra vires* issue. If the district court determines that the Commission may not engage in the consultative process, the question of rulemaking will become moot. If the Commission's actions are upheld in part or in whole, the Commission can then consider afresh the extent to which rulemaking may be appropriate, informed by the district court's resolution and guided by the considerations we have set forth today.

C. *Delegation of Authority to the Telecommunications Committee*

The Commission may delegate its authority to subdivisions or individual members, but such delegation must be accomplished "by published rule or by order."²⁰⁹ The Commission has delegated power to the Committee to act upon certain common carrier applications and requests.²¹⁰ Its published rule, however, provides no explicit authorization to the Committee to engage in the consultative process.

If the Commission argued that the CP exchanges were important to the Committee's discharge of its delegated responsibilities, we might well conclude that no explicit authorization to participate was necessary. Interaction with the public is the "bread-and-butter" of government administration;²¹¹ dialogues with its foreign counterparts might reasonably be characterized as necessary and proper to the efficient transaction of the Committee's business.²¹² In the instant case, however,

²⁰⁹ 47 U.S.C. § 153(d)(1) (1976). See *supra* note 145.

²¹⁰ Specifically, the Committee is authorized to act upon all section 214 and 319 common carrier applications, where the cost of construction or value of the facilities exceeds \$10 million. 47 C.F.R. § 0.215 (1981).

²¹¹ See, e.g., *Home Box Office Inc. v. FCC*, *supra* note 183, 567 F.2d at 57; see also *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1169 (D.C.Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980).

²¹² See 47 C.F.R. § 0.204(a) (1981) ("Any official (or group of officials) to whom authority is delegated in this subpart is authorized to issue orders ... pursuant to such authority and to

the Commission adamantly maintains that the Committee's functions are *strictly* limited to its delegated responsibilities, that the CP meetings do *not* relate to these responsibilities, and that the Committee itself has *no* authority to act on the Commission's behalf at the meetings.²¹³ The Commission characterizes the Committee members' attendance as pursuant to their personal capacities: "The authority to meet with foreign entities is not something for which delegation is required since any commissioner given the nature of his regulatory responsibilities, has the right—indeed, the responsibility—to meet with the public to educate himself regarding the issues."²¹⁴

This argument easily fails. The Commission concedes elsewhere that the commissioners attend the meetings in their official capacities and *qua* the Telecommunications Committee, and the record amply shows that the Committee acts on the Commission's behalf in seeking to effectuate official agency business.²¹⁵ Taking the Commission at its word that the Committee's delegated authority does not encompass such endeavors, we direct that, so long as the Committee continues to play this role in the consultative process, it do so only pursuant to a proper and precise delegation of authority from the Commission.

CONCLUSION

To summarize our decision:

enter into general correspondence concerning any matter for which he is responsible under this subpart....") (emphasis added). We intimate no views on the proper scope of such dialogues.

²¹³ See Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 886 & n. 10, FCC Brief at 15; DOJ Brief at 23 & n. 10; FCC District Court Memorandum at 23 ("The only type of business the Telecommunications Committee may engage in, the consideration of common carrier applications, does not arise at these conferences."), reprinted in JA at 513.

²¹⁴ FCC Brief at 32 n. 26.

²¹⁵ See *supra* notes 22-26, 146-49, 155-57, and accompanying text.

First, with respect to the *ultra vires* count, we conclude that (a) the district court has subject matter jurisdiction, (b) ITT has standing, and (c) the controversy is ripe for adjudication. We therefore reverse the judgment of the district court dismissing that count and remand for further proceedings.

Second, we affirm the district court's judgment ordering disclosure under FOIA of items 1 and 7. We reverse with respect to item 2. As to the other documents contested in this litigation, we reverse and remand to the district court for further consideration and findings.

Third, we affirm the district court's judgment that the CP discussions are "meetings" within the meaning of the Sunshine Act. The public may therefore be excluded from these discussions only in accordance with the Act's stringent closure provisions.

Finally, we (a) reverse that part of the commission's rulemaking denial concluding that the Sunshine Act does not encompass the meetings at issue, and (b) remand the remainder of the order to the Commission for further action in accordance with our opinion.

So ordered.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1982**

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

**FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS
SOUTHERN PACIFIC COMMUNICATIONS COMPANY,
RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS**

No. 80-2324

Civil Action No. 80-00428

ITT WORLD COMMUNICATIONS, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

No 80-2401

Civil Action No. 80-00428

ITT WORLD COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

**Petition for Review of an Order
of the Federal Communications Commission
Appeal from the United States District Court
for the District of Columbia**

**Before: TAMM and MIKVA, Circuit Judges and
BAZELON, Senior Circuit Judge**

JUDGMENT

Filed Feb. 1, 1983

**These causes came on to be heard on a petition for re-
view of an order of the Federal Communications Com-
mission and the records on appeal from the United
States District Court for the District of Columbia, and**

were argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the order of the Federal Communications Commission and the judgment of the District Court appealed from in these causes are hereby affirmed in part and reversed in part, and these cases are remanded, in part, to the Commission and to the District Court, respectively, for further proceedings, all in accordance with the opinion of this Court filed herein this date.

Per curiam
For the Court

/s/ George A. Fisher

GEORGE A. FISHER
Clerk

Date: February 1, 1983.

Opinion for the Court filed by Senior Circuit Judge
Bazelon

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN PACIFIC COMMUNICATIONS COMPANY,
RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS

AND CONSOLIDATED CASES

BEFORE: TAMM and MIKVA, Circuit Judges and
BAZELON, Senior Circuit Judge

ORDER

Filed Apr. 6, 1983

Argued Apr. 16, 1982

On consideration of respondent's petition for rehearing, filed March 18, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner

ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN PACIFIC COMMUNICATIONS COMPANY,
RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS

AND CONSOLIDATED CASES

BEFORE: ROBINSON, Chief Judge; WRIGHT, TAMM,
MACKINNON, WILKEY, WALD, MIKVA, EDWARDS,
GINSBURG, BORK and SCALIA, Circuit Judges

ORDER

Filed Apr. 6, 1983

Argued Apr. 16, 1982

Respondent's suggestion for rehearing en banc has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher, Clerk

BY: /s/ Robert A. Bonner

ROBERT A. BONNER

Chief Deputy Clerk

Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing *en banc*.

Circuit Judge Wald did not participate in the foregoing order.

APPENDIX C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

ORDER

Filed Oct. 17, 1980

It is by the Court this 17th day of October, 1980,
ORDERED, that Defendant's Motion to Dismiss
Count I of Plaintiff's Complaint be and hereby is
GRANTED; and it is

FURTHER ORDERED, Plaintiff's Motion for Sum-
mary Judgment on Counts II and III be and hereby is
GRANTED; and it is

FURTHER ORDERED, that Defendant shall dis-
close to Plaintiff all documents requested herein within
ten (10) days of this Order; and it is

FURTHER ORDERED, that Defendant shall com-
ply with the Government in the Sunshine Act, 5 U.S.C.
§ 552b, consistent with the Memorandum Opinion is-
sued this date FORTHWITH; and it is

FURTHER ORDERED, that Plaintiff shall file its
Motion for Attorneys' Fees within thirty (30) days from
the date of this Order.

/s/ Aubrey E. Robinson, Jr.

AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

MEMORANDUM OPINION

Filed Oct. 17, 1980

Before the Court are Defendant's Motion to Dismiss or for Summary Judgment and Plaintiff's Motion for Summary Judgment in the above captioned action. Plaintiff is an international telecommunications carrier. Defendant is the Federal agency charged with regulating, inter alia, foreign commerce in communication. 47 U.S.C. § 151. Plaintiff alleges that (1) certain actions by the Federal Communications Commission (FCC) are ultra vires and must be enjoined, (2) certain documents were wrongfully withheld pursuant to Exemption 5 of the Freedom of Information Act (FOIA) 5 U.S.C. § 552(b)(5) and must therefore be disclosed, and (3) closed meetings have been held in violation of the Government in the Sunshine Act (SA), and all future meetings must be open to the public. The facts in the instant litigation may be summarized as follows:

During the past six years the FCC has engaged in what is known as the Consultative Process (CP). According to the FCC, the CP is a useful means of obtaining information about plans and priorities "without subjecting them to U.S. regulatory jurisdiction in fact or in appearance." AT&T Co. (TAT-7) 73 FCC 2d. 248, 254-255 (1979). For most of the past six years, the FCC, foreign communications entities,¹ and private in-

¹ In most instances, the foreign communications entities are branches of foreign governments.

ternational telecommunications carriers such as Plaintiff have attended CP meetings.

Recently, the private carriers have been excluded from CP meetings. They were not invited to a conference in Dublin, Ireland, held on October 9, 1979, in which, according to the FCC, "a preliminary discussion was held between the Commission representatives and the foreign entities regarding new service and new carriers in the international telecommunications field." Plaintiffs have been excluded from two subsequent meetings, and more private meetings are planned.

On October 12, 1979, Plaintiff filed a FOIA request seeking all documents relating to the October 9th meeting in Dublin. On October 24, 1979, Plaintiff filed a Petition for Rulemaking with the FCC, proposing that the FCC state that (1) it would not negotiate with foreign communications entities at the CP meetings, (2) no action taken at these meetings would be binding on the FCC, (3) notice of the meetings would be given to private carriers, and said carriers would be given the opportunity to submit comments about the proposed topics, and (4) the meetings would be open to the private carriers.

On November 15, 1979, Plaintiff's FOIA request was denied in part. On February 12, 1980, this action was commenced. On April 24, 1980, the FCC denied Plaintiff's rulemaking request. In that denial, the FCC established procedures for the CP, indicating that (1) it would give advance notice of the time, place, participants, and topics of CP meetings, (2) interested parties could submit written comments on suggested additional topics, problems to be considered, and any other germane items, (3) the FCC would provide oral briefing to interested parties prior to CP meetings, and (4) CP meetings would be open unless circumstances required otherwise.

COUNT I

In Count I, Plaintiff alleges that (1) the FCC is seeking to increase competition among carriers in the inter-

national telecommunications market; (2) the FCC licensed two carriers prior to their making appropriate arrangements with foreign communications entities, and this was never heretofore done; (3) the foreign entities have refrained from making appropriate arrangements with the two new carriers because (a) the new carriers have little to offer the foreign entities in terms of programming and (b) the foreign entities do not want to support competition; (4) the FCC is attempting to force the foreign entities to accept the new carriers in order to enhance competition, and (5) the FCC is therefore negotiating with foreign governments. For the purpose of Defendant's Motion to Dismiss Count I, these allegations must be accepted as true. Based on the above assertions, Plaintiff contends that (1) such negotiations are in contravention of the Logan Act, 18 U.S.C. § 953, which states that negotiations with foreign governments are exclusively within the province of the State Department, (2) negotiating with the foreign entities clearly exceeds the FCC's authority, and (3) it is therefore *ultra vires*, and must be enjoined.

Prior to adjudication of Count I on the merits, Plaintiff must surmount three procedural hurdles, to wit: (1) does this court have subject matter jurisdiction over the claim, (2) does Plaintiff have standing, and (3) is the claim ripe for adjudication? Jurisdiction over appeals from FCC orders rests exclusively in the Court of Appeals. 47 U.S.C. § 402(a). Since Plaintiff sought essentially the same relief in a rulemaking proceeding that it seeks here, Defendant contends that subject matter jurisdiction rests in the Court of Appeals. Plaintiff alleges, however, that while the relief sought is similar, it is not appealing the FCC's order. Rather, Plaintiff asserts that the FCC conduct is *ultra vires*, and jurisdiction therefore rests in the District Court.

This Court has jurisdiction over agency action only if the action was "patently *ultra vires*." *Association of Natl. Advertisers v. FTC*, 617 F.2d 611, 626 (D.C. Cir. 1979) (Wright, C.J., concurring). This Court seriously doubts that Plaintiff could meet this standard. Because

it is clear that Plaintiff cannot prevail on the standing and ripeness issues, this Court need not address the jurisdictional question. See *Philbrook v. Glodgett*, 421 U.S. 707, 721 (1975).

For Plaintiff to have standing in the instant case, it must show that it "suffered a distinct and palpable injury." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Plaintiff's claim is procedural in nature. It does not question Defendant's authority to regulate foreign commerce in communication and provide for greater competition in that field, nor is there any basis for doing so. See 47 U.S.C. § 151 *et seq.* It only claims that Defendant cannot, as a condition precedent to effectuating its policies, negotiate with the foreign entities, because to do so would violate 18 U.S.C. § 953. The Logan Act is a criminal statute which does not bespeak a private right of action. Moreover, the only entity aggrieved by the alleged *ultra vires* conduct is the Department of State, which is not a party in the instant litigation. Assuming *arguendo* that the FCC is engaged in *ultra vires* activity by negotiating with foreign entities, Plaintiff has not shown how this conduct in and of itself has caused it to suffer a cognizable injury. Under *Warth v. Seldin* and its progeny, Plaintiff lacks standing to raise Count I.

Assuming however, that Plaintiff surmounts the standing barrier, this case is not ripe for adjudication. The two new carriers have not yet been accepted by the foreign entities. When and if they are so accepted, Plaintiff can object through the formal rulemaking process, and derive relief if its claim is cognizable and meritorious. See *Assn. of Natl. Advertisers v. FTC*, 617 F.2d at 620-622 and 625-628 (Wright, C.J., concurring). Count I must be dismissed.

COUNT II

In Count II, Plaintiff seeks documents relating to the closed Dublin meeting and communications involving FCC representatives concerning operating agreements between the new carriers and foreign entities. Defendant relies exclusively on Exemption 5 for its failure to

disclose the requested materials. Exemption 5 permits the non-disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 thus protects from disclosure agency records which are "pre-decisional and deliberative." *Mead Data Central, Inc. v. USAF*, 575 F.2d 932 (D.C. Cir. 1978). This two pronged test requires disclosure unless the materials are both "predecisional" and "deliberative." *Jordan v. U.S.*, 591 F.2d 753, 774 (D.C. Cir. 1978).²

For documents to be considered "predecisional," they must relate to specific policy. If they are not part of a clear process leading to a final decision on a given issue, they are less likely to be characterized as "predecisional." *Coastal States Gas Co. v. DOE*, 617 F.2d 854, 868 (D.C. Cir. 1980). In such a case, there is an "additional burden on the agency to substantiate its claim of privilege." *Id.* See also *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975).

In the instant case, the FCC cites no specific policy or process in order to protect the documents in question. In fact, they consistently defend the Consultative Process as a means of receiving information without having to formulate policy or utilize United States regulatory jurisdiction. *AT&T Co. (TAT-7)*, 73 FCC 2d. at 255. Upholding the use of Exemption 5 in the instant case "would go a long way toward undercutting the entire Freedom of Information Act," *Vaughn v. Rosen*, 523 F.2d at 1146, and detract from the Act's dominant objective of disclosure. *USAF v. Rose*, 425 U.S. 352, 360-362 (1976). The documents at issue herein must be disclosed.

² Defendant also claims that the attorney-client privilege, as embodied in Exemption 5, precludes disclosure. This assertion is without merit. That privilege only attaches when an attorney is performing a service that only an attorney can perform, and the communications between attorney and client are made in confidence. Neither showing has been made here. The attorney-client privilege is therefore inapplicable to the instant litigation.

COUNT III

In Count III, Plaintiff alleges that the Government in the Sunshine Act, 5 U.S.C. § 552b, requires that the Consultative Process be open to the public. The only issue in dispute is whether the CP meetings are "meetings" within the meaning of the SA. The Act defines meetings as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2). The FCC does not deny that agency business may be disposed of at CP meetings; in fact, it refused to preclude such an occurrence when it denied Plaintiff's Petition for Rule-making. Nor can it deny that FCC business is "conducted" at CP meetings. The only issue, therefore, is whether the required number of agency members attend CP meetings.

It is uncontroverted that the CP meetings have been attended by three FCC Commissioners, and that the Commissioners are "members" within the meaning of SA. 5 U.S.C. § 552b(a)(3). Defendant contends, however, that 47 U.S.C. § 154(h) states that four members of the Commission are required to constitute a quorum for any FCC business. Section 154(h) is not dispositive, however. 47 U.S.C. § 155(b)(1) authorizes the Commission to delegate any of its functions to a subdivision of the Commission, and 47 U.S.C. § 155(b)(3) states that any action taken pursuant to such a delegation of authority has the same force and effect as an action of the full Commission. The issue, therefore, is whether the three Commissioners have been delegated the authority to act for the FCC pursuant to 47 U.S.C. § 155(b).

It is evident that the authority has been so delegated. The Senate Report of the SA states that "Panels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required

by the subsection to be open to the public.... The whole decision-making process, not merely its results, must be exposed to public scrutiny." S. Rep. No. 94-354, 94th Cong., 1st Sess. 17-18 (1975). Likewise, the House Report states that "[a] subdivision of an agency covered under Section 552b is covered if it is authorized to act on behalf of the agency. Panels ... of an agency are covered if authorized to act on behalf of an agency, even if their action is not final in nature. Thus, panels ... authorized to submit recommendations, preliminary decisions, or the like to the full commission ... are required to comply with the provisions of Section 552b." H. Rep. No. 94-880, 94th Cong., 2d Sess. 7 (1976). It is beyond dispute that the three Commissioners are authorized to submit recommendations to the full Commission. It cannot be contested that the CP is designed to effectuate the decision-making process, and that recommendations facilitating FCC policies may well result from CP meetings. Should Defendant wish to hold CP meetings behind closed doors, they must comply with 5 U.S.C. § 552b(d). They have not yet pursued this remedy, and are therefore in violation of the SA. An appropriate Order follows this Memorandum Opinion.

/s/ Aubrey E. Robinson, Jr.

AUBREY E. ROBINSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

ORDER

Filed Oct. 24, 1980

Upon consideration of Defendant's Motion for a Stay Pending Appeal, the Opposition thereto, the arguments heard this date, and the entire record herein, the Court notes that (1) this Court granted Plaintiff's Motion for Summary Judgment on Count II (under the Freedom of Information Act (FOIA)) and Count III (under the Government in the Sunshine Act (SA)) on October 17, 1980; (2) Defendant asserted in Count II that the documents sought met the requirements of Exemption 5, 5 U.S.C. § 552(b)(5), in that they were both predecisional and deliberative; (3) to date, Defendant has not indicated what "policy or process" was addressed in said documents, as is required by FOIA, *see Coastal State Gas Co. v. DOE*, 617 F.2d 854, 868 (D.C. Cir. 1980); (4) in Count III Defendant asserted that the SA did not apply to the Consultative Process (CP) because CP meetings are "held for the exclusive purpose of clarifying respective views and explaining the policies and actions of the pertinent bodies"; (5) Defendant has consistently refused to represent, either through formal rulemaking procedures or on the record of this case that no agency action will be effectuated at the CP meetings; (6) the facts of this case indicate that (a) three FCC Commissioners attend the CP meetings, (b) those three Commissioners are members of the Telecommunications Committee, and (c) those Commissioners have the authority to make recommendations and take certain agency action; (7) without a representation to the contrary, this Court must infer that agency action is likely

to be effectuated at the CP meetings; (8) those meetings are therefore subject to the requirements of the SA; (9) should Defendant believe that the applicability of the SA significantly frustrates agency action, it may, pursuant to 5 U.S.C. § 552b(c)(9)(B) and 5 U.S.C. § 552b(d) act to preclude public attendance at the CP meetings; (10) under the circumstances presented in the instant case the FCC has not yet had the opportunity to close the CP meetings; (11) it is in the interests of justice that Defendant be given the opportunity to meet the requirements of the Government in the Sunshine Act before it is Ordered to open the CP meetings to the public; (12) the standards for the granting of a stay are delineated in *WMATC v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) and *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); (13) Defendant has met the standards for a stay of this Court's disposition of Count II of the instant case because an Order of immediate disclosure would moot its appeal; (14) Defendant has not met the standards for a stay of this Court's disposition of Count III in the instant case because such a stay would irreparably harm Plaintiff; and (15) because Defendant has represented that the next CP meeting will be memorialized in transcript form, this Court will give Defendant twenty-one (21) days to meet the requirements of the SA. It is therefore by the Court this 24th day of October, 1980,

ORDERED, that this Court's Order dated October 17, 1980, be and hereby is amended; and it is

FURTHER ORDERED, that the word "FORTHWITH" appearing in paragraph five (5) of said Order be and hereby is deleted; and it is

FURTHER ORDERED, that the words "on or before November 15, 1980" be placed in its stead; and it is

FURTHER ORDERED, that Defendant's Motion for a Stay of this Court's disposition of Count II be and hereby is GRANTED; and it is

FURTHER ORDERED, that Defendant's Motion for a Stay of this Court's disposition of Count III be and hereby is **DENIED**.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX E
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 80-229
27296

May 8, 1980

RM 3523

Petition of
ITT WORLD COMMUNICATIONS, INC.

For rulemaking concerning contacts between the FCC
and foreign telecommunications administrations with
respect to future international communication services
and entry of new common carriers.

ORDER DENYING PETITION

Adopted: April 28, 1980

Released: May 2, 1980

By the Commission:

Introduction

1. On October 24, 1979, ITT World Communications, Inc. (ITT) filed a Petition for Rulemaking proposing that the Commission adopt new rules of practice and procedure to regulate its contacts with foreign administrations and telecommunications entities. The goal of these rules, according to ITT, would be to ensure that these contacts neither prejudice the rights of existing U.S. international service carriers, nor compromise the integrity of the Commission's processes. ITT believes that such rules are needed because the Commission, through its Telecommunications Committee, may be planning to continue to meet informally with foreign administrations to discuss future services and entry of new U.S. carriers in international markets.

2. The specific catalyst for the Petition is a conference held last fall in Dublin, Ireland, on October 2-3, attended by representatives of the Commission, the Department of State, the Conference Europeenne des Administrations des Postes et des Telecommunications

(CPT) and Teleglobes Canada.¹ Apparently concerned that this conference portends further contacts somehow inimical to its own interests, ITT filed this Petition. ITT's argument, reduced to its essentials, is that the Commission lacks authority to engage in discussion with foreign governments and telecommunications entities, but, if it does so, it must have regulations governing all its contacts. We disagree, and we deny the Petition for the reasons discussed below.

Summary of Petition

3. After stating that the Commission in the first instance lacks the legal authority to negotiate with foreign governments on behalf of the United States, ITT requests that the Commission issue a policy statement to delineate clearly that the purpose of all meetings with foreign administrations is limited to the exchange of information of mutual interest. In addition, the proposed policy statement would disclaim any intent of the Commission to negotiate or to subject foreign administrations to its regulatory jurisdiction. ITT believes that such a policy statement would prevent any misinterpretation of Commission statements by foreign administrations. Specifically, ITT proposes that the statement make clear that the Commission attendees have no delegated authority to bind the entire Commission and that the Commission will refrain from discussing the merits of matters pending before it or from advancing the interests of one American carrier over another. ITT's concern in this regard is the possibility of Com-

¹ ITT filed a request under the Freedom of Information Act, FOIA 9-192, seeking access to documents concerning the Dublin conference and other contacts between the Commission and foreign governments and telecommunications entities. This request was partly granted and partly denied, FCC 80-78 (released February 20, 1980). ITT has also attacked these contacts collaterally by filing suit in federal court. ITT World Communications, Inc. v. FCC, No. 80-0428 (D.D.C., Filed February 12, 1980).

mission prejudgment of pending and future proceedings. Moreover, ITT requests that the Commission examine the issue of what topics should be discussed at these meetings, expressing concern that the selection of topics may appear to foreign administrations to be sponsoring certain services and carriers to the detriment of others. Furthermore, ITT submits that the selection of topics must be made with on-the-record input from the U.S. carriers to avoid raising serious antitrust questions. ITT explains that if the Commission intends, by its meetings with foreign entities, to foster competition, preliminary proceedings must determine that the services and carriers selected do not subvert the legitimate forces of marketplace competition.

4. In addition to a clarifying policy, ITT wants the Commission to implement comprehensive notice and comment procedures to be followed prior to Commission attendance at these meetings. According to ITT, these measures would ensure that all meetings of this type proceed in a manner consistent with the procedural and substantive rights of all interested parties. Towards this end, ITT proposes that the meetings be open, held on the record with transcripts made available to the public, and with the opportunity for any interested party to present its views, orally, or in writing, at the meeting. In the event of its exclusion, any interested party should be notified in advance of the Commission's rationale for its exclusion with the opportunity to show why such action is erroneous. Moreover, the regulation should require 30 days' advance public notice of all such meetings and the subjects to be discussed; interested carriers could then respond to the propriety of the proposed topics, could inform the Commission of their positions, and could propose additional subjects for discussion. ITT would further require the Commission to indicate its disposition of all comments received, including subjects added or deleted.

5. ITT maintains that the proposed rules and procedures comport with the spirit and the letter of the *Government in the Sunshine Act*, 5 U.S.C. Section 552b.

While allowing that the applicability of the *Sunshine Act* is unclear until the nature of these meetings is determined, ITT submits that any discussion beyond the mere exchange of information falls under the letter of the Act as well as Sections 0.601 through 0.607 of the Commission's Regulations, 47 C.F.R. Sections 0.601-0.607, requiring open meetings except in narrowly-limited circumstances. In any event, ITT believes that the spirit of the *Sunshine Act* applies even to exchange-of-information meetings.

6. In framing a legal foundation for the proposed rule requiring advance notice to any excluded party, ITT cites the *Administrative Procedure Act (APA)*, 5 U.S.C. Sections 553, 557, entitling a party to know the grounds for an administrative determination which is adverse to his interest, and a similar provision of the *Sunshine Act*, 5 U.S.C. Section 552b(f)(1), requiring the Commission to certify publicly its reason for holding a closed meeting. (See also 47 C.F.R. Section 0.605(c)(2) and (d)(2). In addition, ITT cites the Commission's *ex parte* rules, 47 C.F.R. Sections 1.1201-1.1251, as requiring a record of all information obtained from foreign administrations used as the basis for any future administrative decisions. Without a record with a full transcript available to the public, ITT foresees difficulty in assuring that interested parties will have an adequate opportunity to rebut or challenge the information provided by the foreign administrations.

Summary of Responses

7. Comments were filed by RCA Global Communications (RCA), Satellite Business Systems (SBS), Southern Pacific Communications Company (SPCC), GTE Telenet Communications Corporation (Telenet) and Graphnet; reply comments were submitted by ITT, RCA, Graphnet and Western Union International (WUI). For the most part, comments follow along predictable lines with the aspiring newcomers to the field (SPCC, Telenet and Graphnet) viewing the relief re-

quested as an obstacle to their establishing direct overseas services and the incumbents (RCA and WUI) more or less supporting the Petition.²

8. In supporting the Petition, RCA argues that the Commission may exchange views with foreign administrations only within the context of a docketed rule-making proceeding where the Commission's *ex parte* rules and the strictures of the APA would require notice, open recorded meetings and open comment. Like ITT, RCA believes that these requirements would protect the rights of interested parties, disclose the bases of Commission decisions, avoid any prejudice to pending matters and ensure that the Commission does not usurp the diplomatic role assigned to other federal entities. Submitting that private informal exchanges outside of a Commission proceeding are illegal in the first instance under Section 553 of the APA, RCA further adds that Commission involvement in such areas previously left to free enterprise runs directly counter to current deregulation policies.

9. The opponents agree that ITT's proposed rules are a protectionist measure, that is, an attempt to further the interests of ITT and to inhibit the Commission's ability to promote a policy of greater competition in overseas communications. Graphnet specifically raises the Commission's right and duty to discuss Commission objectives to secure overseas cooperation in "worldwide service," citing Sections 1, 2, 303(g), and 4(i) of the Communications Act of 1934. SBS recounts the inability of Telenet to obtain a formal operating agreement with the British administration to illustrate its belief that the adoption of ITT's proposal would thwart its own ability to furnish direct services.

10. Although conceding the Commission's inability to negotiate directly with the foreign administrations, the opponents emphasize the need for permitting the Commission wide latitude in the scope of these discussions

² WUI's pleading merely supports ITT's concept without addressing the arguments.

without the proposed procedural constraints. In support, SBS notes the Commission's role as the principal U.S. agency responsible for implementing U.S. telecommunications policy and the entity most familiar with the carriers it regulates. SPCC agrees with this notion, emphasizing that, in order for foreign administrations to get an objective view of the Commission's pro-competition policy, the view should be presented by a neutral Commission rather than interested private parties. Telenet adds that the Commission must be free to learn first-hand the views of foreign entities to develop an independent expertise and understanding. It asserts that the international record carriers (IRC's), having a vested interest in this subject matter, cannot be expected to function as unbiased intermediaries.

11. SPCC contends that there is no evidence that any meetings between the Commission and foreign entities developed into negotiations or that foreign administrations misconstrued the expressed intent of the Commission to avoid negotiating sessions. In a similar vein, Telenet states that the factual predicate upon which ITT bases its petition is unclear, pointing to ITT's concession that the Commission has been careful only to consult and to exchange information rather than to negotiate. SPCC also notes the absence of any showing that the Commission contacts with foreign administrations resulted in or will result in prejudgment of particular applications for authorization to provide service; were such a showing made, the issue may be taken to the Commission or the courts. In addressing this point, Telenet and Graphnet agree that informing foreign administrations of U.S. policy does not involve prejudgment but only a request for foreign recognition of Commission policy. Graphnet adds that ITT has not alleged any injury resulting from past discussions nor expected injuries from future discussions encouraging new entry.

12. With respect to the proposed procedures, Graphnet maintains that they are not necessary to protect the procedural rights of the IRC's and would be likely to stifle a spontaneous flow of information between the

Commission and foreign entities. Moreover, Graphnet points to the severe burden that would be imposed on the Commission staff with respect to handling the notice, comment and formal agendas prior to meetings. Regarding ITT's suggestion that the Commission predetermine the topics to be discussed at these meetings, SPCC submits that such selective discussion would itself effectively prejudice pending decisions before the Commission and carry with it significant antitrust problems. SPCC is the only opponent who specifically agrees with certain of ITT's suggested procedures, to wit: that there should be public notice of proposed meetings; that all meetings should be made public; that interested parties should be told in advance if they are to be excluded from the meetings; and that records should be kept of the meetings. SPCC does not agree, however, that there must be an opportunity for interested carriers to comment on the agenda, believing that such collaboration between the Commission and private firms would have antitrust ramifications. Furthermore, SPCC maintains that parties have other opportunities to comment on any proposed Commission action based on these discussions through normal Commission processes.

13. Finally, several of the carriers address the question of whether ITT's proposed rules are required by law. RCA contends that these measures are already applicable to Commission discussions and meetings with foreign administrations through existing statutes and rules. Telenet, on the other hand, categorically states that ITT's proposed rules are *not* required by law. It argues that, since foreign telecommunications entities are not subject to the jurisdiction of the FCC, their informal meetings with Commission members and staff cannot be subjected to APA and *Sunshine Act* requirements. Graphnet, too, submits that the Commission can gather information and discuss policy directions without engaging in improper *ex parte* contacts that taint upcoming proceedings. In this regard, Graphnet maintains that the APA only requires that a summary of the

information forming the basis for decisions be disclosed in time for contrasting views to be considered.

14. The reply comments generally do not reveal any new facts or arguments relevant to our decision. RCA, for example, attacks the notion that there can be wide latitude in agency contacts with foreign entities as inconsistent with legal restraints on Commission action. ITT reiterates its position that negotiations will take place and that the APA applies to these contacts. In the only new matter presented, Graphnet relies in rebuttal on the recent decision by the Court of Appeals in the case involving the disqualification of FTC Chairman Pertschuk from a rulemaking proceeding.³

Discussion

15. Our primary objective in dealing with the subject of international communications is, has been, and will continue to be an open and impartial regulatory regime that is responsive to both the public and the regulated companies. Because the Petition and the collateral suit in federal court may have raised questions, however unsupported, about our processes, we will undertake a point-by-point response. As we see it, there are four issues raised in the Petition: (1) whether the Commission has engaged in "negotiations"; (2) whether the Commission has statutory power to make *any* contacts with foreign governments or telecommunications entities; (3) whether the *Government in the Sunshine Act* is applicable; and (4) whether there are *ex parte* and other due process questions involved here. In the following discussion, we conclude: (1) that the Commission has not "negotiated" with foreign entities; (2) that contacts with foreign administrations are not only permissible but are encouraged by the Communications Act; (3) that the *Sunshine Act* does not apply to contacts of this type; and (4) that the APA's and our own *ex parte* rules are

³ Association of National Advertisers, Inc. v. FTC, No. 79-1117 (D.C. Cir., Dec. 27, 1979).

usually inapplicable to the discussions in question but are observed scrupulously when they do apply.

16. Although acknowledging that "the Commission has exercised care in consulting rather than negotiating with foreign administrations" (Petition at 4), ITT nevertheless argues that, because the Commission does not have specific authority to negotiate with foreign governments on behalf of the United States, Commission members and staff may not meet informally with their foreign counterparts to discuss telecommunications policies and goals. As a preliminary matter, ITT's position is at odds with its concession (Petition at 6) that "the Commission has an affirmative responsibility to cooperate with foreign telecommunications entities toward achievement of" the goal of "foster[ing] a rapid and efficient worldwide telecommunications system".

17. Not surprisingly, ITT's petition provides little of the background of the Commission's participation in the foreign discussions the carrier has suddenly determined to oppose. For almost six years now, the Commission and other U.S. agencies, including the State Department, have engaged in a series of informal conferences with Canadian and European telecommunications entities to discuss facilities planning. These conferences, known as the Consultative Process, reflect the mutual desire of all participants to improve, through the exchange of information and views, the usage planning of jointly-owned telecommunications facilities in the North Atlantic Region. A detailed history of the Consultative Process is set forth in *Policies for Overseas Common Carrier Facilities*, 73 FCC 2d 193 (1979). ITT and the other international record carriers have actively participated in and supported the Consultative Process over the years. ITT's about-face with respect to the Dublin conference, which was a facilities planning consultation, stems from the fact that during the conference there was a separate, preliminary discussion among the participants concerning the Commission's desire to initiate similar consultations on such important non-facilities topics as new services and new carriers. Out of appar-

ent concern that such additional consultations could ultimately lead to greater competition in the provision of international communications services, ITT has filed a petition which in effect challenges the Commission's authority to engage in any form of foreign consultative discourse.

18. The Consultative Process, even where limited to a facilities planning format, provides a valuable if not indispensable source of information, not just because it facilitates our predictive judgment as to future foreign communications needs and the solutions to those needs that will be acceptable to other countries, but also because foreign entities can participate without being subjected "to U.S. regulatory jurisdiction in fact or appearance". *A.T.&T. Co.*, 73 FCC 2d 248, 254 (1979). The process also frees us from near total dependence on our regulatees in gauging foreign telecommunications problems and needs. These considerations apply with at least equal force to any expanded consultations along the lines discussed at Dublin. These expanded contacts are still in a formative, tentative stage, and we do not presently know whether they will become a permanent part of the Consultative Process per se, or a separate process altogether. We intend to pursue the matter, however, unless experience shows that it should be abandoned as unworkable. Like the on-going facilities planning process, consultations to explain and promote our statutory mandate are, as shown below, well within our authority and do not, contrary to ITT's position, take us into the area of formal international negotiation.

19. Negotiation between sovereign states in general connotes a formal diplomatic process for the development and formulation of various kinds of binding executive agreements and treaties. The participants in such negotiations ordinarily have authority to speak for their respective countries and to commit them, subject frequently to a subsequent formal ratification by the individual sovereigns, to the terms of any agreement that may be established. This level of diplomatic process ob-

vously bears little similarity to the type of informal discussion the Commission's Telecommunications Committee engages in.⁴ In the first place, even if the purpose of the Commission's contacts was to reach some form of formal telecommunications agreement, the participating Commissioners would lack the authority to bind the Commission, much less the United States, to any such agreement.⁵ Moreover, the limited scope of authority of the Committee has always been, and will continue to be, fully explained in advance of these talks, and we have no basis for concluding that any foreign participant has ever misunderstood the limits of the Committee's authority. In fact, ITT contradicts its own position by citing a letter from a foreign participant in these talks which plainly demonstrates the author's understanding that "the Commission cannot engage in discussions which might be construed as negotiation of differences * * *" (Petition at 4, n.1).

⁴ The Commission fully recognizes that international negotiation is the province of the State Department. See 22 U.S.C. 2656. Moreover, any implication that the Commission's informal consultations conflict with executive prerogative overlooks the Department's active participation in the conferences, starting with the first such session in Munich, Germany in 1974. In its collateral court suit (though not in its petition), ITT suggests that the Commission's foreign contacts are somehow inconsistent with the Logan Act (18 U.S.C. 953), a statute which prohibits U.S. citizens from engaging in *unauthorized* private correspondence or intercourse designed to influence "the measures or conduct of any foreign government * * * in relation to any disputes or controversies of the United States". In the unlikely event that this provision applies to the Commission, we believe our statutory authority to regulate foreign communications services amply satisfies its requirement that any such contacts be authorized by the U.S. Government. We cannot resist observing, however, that ITT is silent on the Logan Act's applicability to ITT's numerous contacts with foreign governments to negotiate private operating agreements.

⁵ As discussed in more detail below, the authority of the Commission's Telecommunications Committee is narrowly circumscribed. See 47 C.F.R. Section 0.215. In the absence of a specific delegation, the Committee can not bind the whole Commission.

20. To the extent that the Commission needs specific authority to engage in the informal consultations ITT challenges, we think the Act clearly permits—in fact encourages—such contacts. To begin with, the purpose of the Act, in part, is the “* * * [regulation] of interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges” (Section 1, 47 U.S.C. 151). In furtherance of that purpose, the Commission, among other powers, is authorized to license common carriers subject to the Act to provide foreign communication services (Section 214, 47 U.S.C. 214.).⁶ The Commission does not, however, possess the authority to compel the acceptance by foreign governments of telecommunications services that we have found to be required by the public convenience and necessity. Thus, in an attempt to avoid frustration by foreign governments of our mandate to make available to U.S. consumers a “world-wide wire and radio communications service”, we have undertaken to have Commission representatives meet face to face with them to discuss mutual present and future telecommunications needs and the policies which will best serve them.⁷ Many countries do not share our view that reliance on competition will ultimately provide the most efficient services at the lowest cost to consumers. Informal talks allow us the opportunity to improve foreign understanding of the bases for and the nature of our

⁶ The Commission's involvement in foreign communications permeates both the Communications Act of 1934 (*see, e.g.*, sections 301, 303(n) and (r), 47 U.S.C. 301, 303 (n) and (r)) and the Communications Satellite Act of 1962 (*see, e.g.*, section 201 (c), 47 U.S.C. 721(c)). The Commission is empowered to “* * * perform any and all acts * * * as may be necessary in the execution of its functions” (section 4(i), 47 U.S.C. 154(i)).

⁷ Ordinarily, these discussions would be attended by one or more of the three Commissioners who comprise the Telecommunications Committee.

pro-competition policies and, at the same time, to increase our knowledge of any unique telecommunications problems or policies which may exist in a particular country. We believe these consultations can assist in the development within the U.S. regulatory process and within foreign decision-making fora of telecommunications policies which are independently arrived at but which reflect a greater awareness of each other's vital telecommunications concerns. This process is not a process of negotiation since it recognizes that each participant must independently adopt positions in accordance with the procedural and substantive requirements of its own legal system. Nevertheless, the process may result in a cooperative telecommunications climate between the countries involved which should significantly enhance the prospect for foreign acceptance of previously authorized services and services that may be licensed in the future.⁸ To the extent that these informal discussions can advance our progress toward realization of statutory goals, they are a necessary and natural corollary of our international licensing authority.

21. ITT next contends that, even if Commission members may lawfully participate in the discussions at issue, they may do so only in open meetings under the *Government in the Sunshine Act*, 5 U.S.C. 552b, and only after adoption of rules such as ITT here proposes. At the heart of ITT's contention is the belief that existing procedures and rules do not provide adequate safeguards against claims of prejudgment that could result from the foreign contacts.⁹ We see no need to supplement the existing laws that ITT finds inadequate.

⁸ The comments supporting the Petition suggest that these informal talks impermissibly involve the Commission in foreign policy matters. The Commission is involved in international communications policy matters. That involvement, however, derives not from these consultations, but principally from our statutory authority to license foreign communications services.

⁹ ITT's proposed rules would apply only to foreign contacts. It apparently believes that existing laws and rules provide adequate protection against prejudgment in other contexts.

22. As a preliminary matter, we do not agree that the *Sunshine Act* applies to the informal consultations ITT opposes. By its terms, Section 552b(b) specifies that “* * * every portion of every meeting of an agency shall be open to public observation.” The term “meeting”, however, is defined in Section 552b(a)(2) as “* * * the deliberations of a least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *”. Normally, the Commission may take action only when at least four of the seven members, or a quorum, are present. See Section 4(h) of the Act, 47 U.S.C. 154(h). Since only three members sit on the Telecommunications Committee, they could not act on behalf of the Commission in the course of any consultations, even if all three of the committee members attended, unless specifically delegated the authority to do so under Section 5(d)(1), 47 U.S.C. 155(d)(1)¹⁰ If four or more Commissioners attended a foreign consultation, the initial question, for purposes of determining the applicability of the *Sunshine Act*, would be whether the Commissioners engaged in deliberations which determined or resulted in the joint conduct or disposition of official agency business. Thus, the *Sunshine Act* does not require public observation of the Committee’s discussions with foreign representatives. In fact, ITT’s Petition cites no law or rule which would prohibit one, two, or even three Commissioners from conferring in private with anyone, foreign or otherwise, to discuss any matter not pending before the Commission. The notice and comment features of the APA and the open-meeting provisions of the *Sunshine Act* were not intended to govern every outside contact agency members and staff might have. These informal consul-

¹⁰ The Telecommunications Committee’s authority to act on behalf of the Commission is presently limited to action on certain common carrier applications and requests. See 47 C.F.R. 0.215. The Committee’s meetings with respect to such matters are, of course, subject to the *Sunshine Act*.

tations are not a forum for agency decision making, and they do not involve a deliberative process for the disposition of any of the Commission's official business. To the extent that any information obtained in these consultations subsequently becomes relevant to a Commission proceeding, it will be fully disclosed and fully subject to APA decision making procedures.

23. The Commission nevertheless recognizes and supports the desirability of conducting its activities, both formal and informal, within public view, and we entertain no general intention of departing from that preference with respect to the discussions at issue here. At the same time, however, we can not ignore the fact that some foreign administrations may not share this policy. It is likely, therefore, that, notwithstanding our desire for public discussions, on some occasions a choice will have to be made for a closed session rather than foregoing the benefits of a contact we believe we have an affirmative obligation to pursue. We think the Commissioners who attend these discussions are entitled to make such a choice based on all the circumstances. We will, as a matter of discretion, however, follow certain notice and reporting steps with respect to contacts with foreign administrations. See paras. 27, 28, *infra*.

24. Most of ITT's remaining arguments are in reality addressed to the advisability, rather than the legality, of informal discussions with foreign administrations. ITT sees such discussions as fraught with the potential for prejudgment of pending and future cases and for *ex parte* influences.

25. First, ITT apparently would find prejudgment in any Commission efforts intended to assure the effectuation of foreign interconnection rights for carriers we have previously licensed to provide foreign communications services. Such a position is without merit. Promoting the implementation of our public convenience and necessity determinations is plainly within our authority. Indeed, any assertion that the Commission lacks the authority to implement its regulatory determinations would effectively vitiate the Commission's

mandate under Section 1 of the Communications Act to regulate foreign communications services. Moreover, we perceive no legitimate public interest basis for objection to such efforts by incumbent international record carriers.

26. Second, we believe ITT's contentions are speculative, for in the absence of a pending proceeding, be it formal or informal, questions of prejudgment or *ex parte* contact simply do not arise.¹¹ In any event, ITT has not explained why existing laws will not adequately protect its rights if it believes that a Commissioner has made a statement suggesting prejudgment of a particular pending matter, or receives or makes an *ex parte* communication with respect to one. The mere fact that prejudicial statements, or *ex parte* communications, could be made during the course of a closed consultation does not support the conclusion that Commission members may not participate in such consultations. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) ("[I]nformal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness. * * * * Of course, if the information contained in such a communication forms the basis for agency action, then ... that information must be disclosed to the public in some form"). Even where the *Sunshine Act* applies, there are exceptions to the open meeting requirement. In either case, a party seeking to establish prejudice in a subsequent or pending proceeding faces the same problems of proof. Moreover, the theoretical possibility that improper conduct will occur

¹¹ The case on which ITT principally relies in this connection, *Cinderella Career and Finishing School, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), was recently distinguished in *Association of National Advertisers, Inc. v. FTC*, ____ F.2d ____ (D.C. Cir. No. 79-1117, decided December 27, 1979). The latter case is particularly instructive here for its discussion of the wide latitude agency members have to air their views even though they may relate to matters embraced by a pending proceeding.

does not vitiate the presumption to which the Commission is entitled, here as elsewhere, that agency officials will judge a particular controversy on its own merits.¹² We see no greater risk of the problems ITT envisions in these consultations than is present in every other contact the Commission or its members and staff may have with the public.

27. To avoid any misunderstanding, however, we will state the procedures that we intend to continue to follow when the Telecommunications Committee meets with foreign entities. These procedures are flexible, and we expressly reserve the right to depart from them where necessary to accommodate any special circumstances which may arise with respect to a specific conference.

28. As in the past, whenever a conference is scheduled, we will give notice in advance indicating the time and place, the persons expected to attend, and the general topics to be discussed. Interested persons will have an opportunity to submit written comments suggesting additional topics, specific problems to be raised, and anything else germane. We will try to schedule an oral briefing before the session, which would be open to anyone. The conferences themselves will generally be open to observers unless it is determined that circumstances exist which warrant closure. Following each conference at which topics of widespread interest are discussed, we will conduct a public debriefing. In sum, we intend to apply the procedural safeguards which are appropriate for the specific subject matter discussed at each conference.¹³

¹² See *Central Ark. Action Sale, Inc. v. Bergland*, 570 F.2d 724, 731 (8th Cir. 1978).

¹³ For example, if discussions do touch on matters at issue in pending proceedings, we will apply any applicable *ex parte* rules. See 47 C.F.R. 1.1201 *et seq.*; Interim Policy Statement on Ex Parte Communications in Informal Rulemaking Proceedings, 68 F.C.C. 2d 804 (1978). (We will soon be reexamining our *ex parte* procedures for informal rulemaking and, in that connection, will deal with the applicability of those procedures to the international consultative process.)

29. Our procedures comply fully with both the letter and the spirit of all relevant laws and principles of due process, and they have worked efficiently and fairly. Changing them along the lines advocated by ITT and RCA would not further the *public* interest, which is our paramount concern.

30. ACCORDINGLY, IT IS ORDERED that the Petition of ITT World Communications, Inc. for rule-making, RM 3523, is denied.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

JAN 10 1960

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1959

**FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS**

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

JOINT APPENDIX

REE E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-8217
Counsel for Petitioners

GRANT S. LEWIS, Esq.
LeBoeuf, Lamb, Leiby & MacRae
250 Madison Avenue
New York, New York 10017
(212) 715-5000

HOWARD A. WHITE, Esq.
ITT World Communications Inc.
100 Plaza Drive
Secaucus, New Jersey 07094
(601) 222-5000

Counsel for Respondents

**PETITION FOR WRIT OF CERTIORARI
FILED IN SUPREME COURT
CERTIORARI GRANTED BY SUPREME COURT**

TABLE OF CONTENTS*

	Page
1. District court docket entries	1
2. Court of appeals docket entries	5
3. ITT's FOIA request for inspection of records	20
4. FCC's response to ITT's FOIA request	22
5. ITT's petition for rulemaking	32
6. ITT's reply to comments filed in FCC rulemaking proceeding.....	50
7. Certified list of items in record of FCC rulemaking proceeding.	60
8. District court complaint	62
9. Answer to complaint, with accompanying exhibits ..	72
a. Exhibit A, Telex dated March 20, 1979, from FCC General Counsel Robert R. Bruce to Mr. R. Seguin.....	77
b. Exhibit B, Excerpts from transcript of meeting, March 22, 1979, in Montreal, Canada	82
c. Exhibit C, Telex dated October 31, 1979, from FCC Chairman Charles D. Ferris to overseas administrators	84
10. Affidavit of Robert E. Gosse	89
11. Public notice concerning Consultative Process meeting to be held February 20-21, 1980, in Ascot, England	92
12. FCC memorandum opinion and order concerning ITT's FOIA request	93
13. Affidavit of H. Russell Frisby, Jr.	106
14. FCC's response to ITT's first set of interrogatories	108
15. Affidavit of Grant S. Lewis, with accompanying exhibits.....	124
a. Exhibit B, File memorandum summarizing February 1980 Consultative Process session in Ascot, England	127
b. Exhibit C, Transcript of February 8, 1980, FCC meeting.....	142
c. Exhibit D, Transcript of April 22, 1980, FCC meeting	156

*The opinion of the court of appeals, the opinion of the district court, and the order of the Federal Communications Commission denying respondent's petition for rulemaking are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

II

	Page
16. Excerpts from ITT's memorandum of points and authorities in support of motion for summary judgment	164
17. ITT's statement of material facts in support of its motion for summary judgment	170
18. FCC's opposition to ITT's statement of material facts	173
19. Affidavit of FCC Commissioner Robert E. Lee	175
20. Affidavit of Willard L. Demory	177
21. Order granting certiorari	180

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

RELEVANT DOCKET ENTRIES

1980

Feb 12	COMPLAINT appearance
Feb 12	FIRST request by pltf for production of documents
Feb 12	FIRST set of interrogatories by pltf to deft
Feb 12	REQUEST by pltf for appointment of special process server and Order by Clerk appointing Laurie E Londoner to serve summons and complaint upon deft, Attorney General and US Attorney
Feb 12	SUMMONS (3) and copies (3) of complaint issued
Feb 14	AFFIDAVIT of service on deft, US Atty and Atty Gen by mail on 2-12-80
Feb 20	AFFIDAVIT of service on U.S. Atty on 2-19-80.
Feb 20	REQUEST by defts for hearing in accordance with the schedule set forth in the Pretrial Order of 11-13-79, defts motion for summary judgment.
Mar 21	STIPULATION extending defts time to respond to complaint and first set of interrogatories and first request for production of documents to 4-21-80, so ordered. (FIAT)(N) Robinson, J.
Apr 21	MOTION by deft for enlargement of time and P&A's in support thereof.
Apr 21	ANSWER by deft to complaint; exhibits A,B, and C.
Apr 21	CALENDARED CD/N
Apr 23	SUPPLEMENTAL memorandum by deft to motion for enlargement of time.
Apr 25	ORDER filed 4-22-80 extending defts. time to respond to interrogatories and request for production of documents to 4-25-80. (N) Robinson, J.

May 9 STATUS report by deft.

May 13 RESPONSE by deft to plttf's first set of interrogatories. "Leave to file granted." (FIAT) Robinson, J.

May 22 MOTION by pltf. for an order to compel discovery; memo of P&A's exhibits A and B.

May 27 ORDER filed 5-22-80 that deft. shall file its dispositive motion on or before May 31, 1980. (N) Robinson, J.

June 2 MOTION by deft. for a protective order pending resolution of a dispositive motion.

June 2 MOTION by deft. to dismiss or, in the alternative, for summary judgment; memo of P&A's; exhibits A-I.

June 3 NOTICE by deft. of filing; table of contents; table of authorities; exhibit J.

June 16 MOTION by pltf. for enlargement of time and P&A's in support thereof.

June 16 REPLY memorandum of P&A's by pltf. in support of motion to compel discovery and in opposition to defts. motion for a protective order.

June 26 ORDER filed 6-24-80 granting defts. motion for protective order. Plaintiff to file opposition to motion to dismiss by 7-21-80. (N) Robinson, J.

July 24 STIPULATION of parties with approval of the Court extending to and including July 28, 1980 for pltf. to file opposition to defts. motion to dismiss. (FIAT)(N) Robinson, J.

July 28 MOTION by pltf. for summary judgment, or in the alternative, for in camera inspection of documents on its second claim for relief and for summary judgment on its third claim for relief; exhibits A-D; statement of material facts; affidavit of Grant S. Lewis.

July 28 MOTION by pltf. for leave to file a memo of P&A's in excess of page limitation; exhibit.

Aug 6 ORDER filed 8-1-80 granting pltf's. motion to file memorandum of P&A's in excess of page limitation. (N) Robinson, J.

Aug 6 MEMORANDUM of P&A's by pltf. in support of pltf's. motion for summary judgment and in opposition to defts. motion to dismiss or for summary judgment.

Aug 8 STIPULATION granting deft. until 8-18-80 to serve response to motion for summary judgment; so ordered. (fiat) (N) ROBINSON, J.

Aug 19 STIPULATION granting deft. until 9-4-80 to oppose motion for summary judgment; pltf. to reply by 9-26-80, so ordered. (FIAT) Robinson, J.

Sept. 10 MOTION by deft. for enlargement of time to 9-11-80 within which to file opposition to pltf's. motion for summary judgment.

Sept. 12 MEMORANDUM of P&A's by deft. in opposition to pltf's. motion for summary judgment, and defts. opposition to pltf's. statement of material facts.

Sept. 15 ORDER filed 9-10-80 extending defts. time to reply to motion for summary judgment to 9-11-80. (N) Robinson, J.

Sept 29 STIPULATION that pltf's. reply memorandum in support of its motion for summary judgment to be served by 10-6-80; so ordered. (FIAT)(N) Robinson, J.

Oct 6 REPLY memorandum of P&A's by pltf. in support of pltf's. motion for summary judgment; exhibit A.

Oct 22 MEMORANDUM OPINION filed 10-17-80. (N) Robinson, J.

Oct 22 ORDER filed 10-17-80 granting defts. motion to dismiss Count I of complaint; granting pltf's. motion for summary judgment on counts II and III; deft. to disclose to pltf. certain documents within 10 days; pltf. to file its motion for attorney's fees within 30 days. (N) Robinson, J.

Oct 23 MOTION by deft. for stay of order pending appeal; memo of P&A's; exhibit 1.

Oct 24 SECOND set of interrogatories by pltf. to deft.

Oct 24 SECOND request by pltf. for production of documents.

Oct 24 MEMORANDUM of P&A's by pltf. in opposition to defts. motion for a stay pending appeal.

Oct 24 NOTICE of appeal by deft. from order of 10-17-80. Govt. no fee. Copy mailed to Eugene R. Fidell.

Oct 27 COPY of notice of appeal and docket entries transmitted to USCA. USCA #80-2324.

Oct 24 MOTION by deft for stay of Order of 10-17-80 pending appeal, argued and taken under advisement. (Rep: R. Weber) Robinson, J.

Oct 29 ORDER filed 10-24-80 amending Order of 10-17-80; granting defts. motion for stay of disposition of Count II and denying defts. motion for stay of disposition of Count III. (N) Robinson, J.

Oct 29 AMENDED notice of appeal by pltf. Govt. no fee. Copy mailed to Grant S. Lewis and Eugene R. Fidell, attachment.

Oct 29 COPY of notice of appeal and docket entries transmitted to USCA. USCA #80-2324.

Nov 3 TRANSCRIPT of proceedings of 10-24-80, pages 1-42. (Rep: R. Weber); Court copy.

Nov 14 NOTICE of cross appeal by pltf. from order of 10-17-80. \$70.00 paid and credited to U.S. Copy mailed to Surell Brady and to John Greenspan.

Nov 14 COPY of notice of appeal and docket entries transmitted to USCA. USCA #80-2401.

Nov 20 RECORD on appeal delivered to USCA; receipt ackn.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSIONER, RESPONDENT

[PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION]

RELEVANT DOCKET ENTRIES

- (C)06-30-80 4-Petitioner's petition for review of an order of the
FCC (m-30)
- (C)07-01-80 Certified copy of petition for review mailed to
FCC & Attorney General
- (T) 07-30-80 4-Motion of RCA Global Communications, Inc. for
leave to intervene (m-30)
- (T)08-05-80 4-Motion of Southern Pacific Communications
Company for leave to intervene (m-5)
- (B)08-08-80 Clerk's order that the motions of (1) Southern Pa-
cific Communications Company ("SPCC") and
(2) RCA Global Communications, Inc. (RCA
Globcom) for leave to intervene are granted
- (T)08-11-80 Certified Index to Record (n-5)
- (T)09-03-80 4-Petitioner's motion to defer briefing (m-3)
- (B)09-23-80 Clerk's order that the time for filing petitioner's
initial brief is extended until 40 days after the
District Court has entered its final decision con-
cerning certain pending motions in that Court in
ITT World Communications, Inc. v. FCC, Civil
Action No. 80-0428. Counsel for petitioner shall
advise the Court, through its Clerk, the status
of the aforesaid matter within 60 days from the
date of this order and, if necessary, at 60 day in-
tervals thereafter
- (T)11-26-80 4-Petitioner's motion for consolidation with Nos.
80-2324 and 80-2401 and to establish a briefing
schedule (m-25)
- (T)12-05-80 4-FCC's response to motion for consolidation and
to establish a briefing schedule (m-5)

- (T)12-15-80 4-Petitioner's reply in support of motion for consolidation and to establish briefing schedule (m-12)
- (B)01-02-81 Order per CJ Wright that the Clerk is directed to schedule this case for argument on the merits on the same day and before the same panel which considers the appeal and cross-appeal in docket Nos. 80-2324 and 80-2401; and that the time for filing petitioner's brief is extended for a period of 40 days from the date of this order. The remaining briefs shall be filed in accordance with Rule 31(a) F.R.A.P. Intervenor's briefs shall be deferred 15 days after the brief is filed by the principal party they support if a notice of filing by intervenor is submitted on or before the date petitioner's or respondent's brief is filed. Only in that event will the time for filing the next brief required under Rule 31(a), F.R.A.P. be enlarged to accommodate that deferred filing. Counsel for the parties may utilize fully the provisions of Rule 28(i), F.R.A.P. with the briefs filed in the appeal and cross-appeal in Nos. 80-2324 and 802401.
- (A)2-10-81 4-Petitioner's (ITT World Communications, Inc.) consent motion for extension of time to file its brief (m-10)
- (B)02-18-81 Clerk's order granting petitioner's (ITT World Communications, Inc.) consent motion to extend time to file its brief to 2-17-81
- (T)02-18-81 4-Petitioner's motion for leave to file brief in temporary form (m-17)
- (T)02-18-81 4-Petitioner's motion for leave to file a brief in excess of page limitation (m-17)
- (T)02-18-81 15-Petitioner's statutory appendix (m-17)
- (T)02-18-81 7-Joint Appendix (m-17)
- (B)02-20-81 Per Curiam order that appellant's (FCC) motion for stay pending appeal is denied and that appellant's motion to expedite is granted and the Clerk is directed to schedule this case for argument as soon after the filing of briefs as the business of the court permits; and that ITT World Communications, Inc., is granted leave to file in temporary form its brief in excess of the page limitations. This brief shall be considered filed in Nos. 80-1721, 80-2324 and 80-2401.

- Robb, Wald and Ginsberg (who did not participate), CJs
- (B)02-20-81 4-Petitioner's (ITT World Comm, Inc.) brief (m-17)
- (R)2-26-81* Per Curiam order that the motion to strike the brief is denied; Robb, Wald and Ginsburg, Circuit Judges Circuit Judge Ginsburg did not participate in the foregoing order
- (R)2-26-81 4-Respondent's opposition to motion for leave to file brief in excess of page limit and cross motion to compel compliance with orders of 1-2-81 (m-20)—filed per order above
- (T)03-09-81 15-Petitioner's (ITT World Comm, Inc.) brief (m-3)
- (T)03-11-81 4-Respondent's (FCC) motion to extend time to file brief to April 6, 1981 (m-11)
- (C)03-16-81 4-Petitioner's response to FCC's motion to extend time to file brief (m-16)
- (T)03-27-81 4-FCC's motion to extend time to file brief to June 5, 1981 (m-27)
- (B)04-14-81 Order per CJ McGowan that the time for filing respondents' brief is extended to and including June 5, 1981
- (T)05-26-81 4-Joint motion to defer briefing schedule (m-26)
- (B)06-01-81 Clerk's order granting the joint motion to defer briefing schedule and the filing of briefs herein is deferred pending the outcome of settlement negotiations among the parties. Respondent shall report to the Court on the progress of negotiations within 45 days from the date of this order and at 60 day intervals thereafter, if necessary.
- (V)07-15-81 4-FCC's status report (m-15)
- (T)09-14-81 4-FCC's status report (m-14)
- (V)11-13-81 4-Letter from counsel for respondent confirming the statement made by FCC in their status report (m-13)
- (V)11-13-81 4-FCC's status report (m-13)
- (V)11-16-81 Letter dated 11/12/81 from counsel for petitioner advising of status
- (B)12-01-81 Order per CJ Robinson that the briefs of the FCC and the Department of Justice be filed not later than January 15, 1982. All briefs in reply shall be filed not later than March 1, 1982.

- (V)01-15-82 4-FCC's motion for two-working-day extension of time to file brief (m-15)
- (B)01-19-82 Order per CJ Robinson that respondents' brief(s) may be filed by the close of business January 19, 1982.
- (C)01-27-82 15-Respondents' brief (m-19)
- (V)02-05-82 15-Respondents' corrected brief (m-2)
- (V)03-02-82 15-Petitioner's reply brief (m-1)
- (B)04-09-82 Clerk's order, sua sponte, that the following times are allotted for the oral argument of this case: Petitioner—15 minutes; Respondents—15 minutes. Only one counsel per side will be allowed to argue.
- (C)04-13-82 4-Letter from counsel for petitioner advising of additional authorities pursuant to FRAP 28(j) (m-12)
- (C)04-16-82 ARGUED BEFORE SCJ Bazelon and Tamm and Mikva, CJs
- (C)06-16-82 4-Letter from counsel for petitioner advising of additional authorities pursuant to FRAP 28(j) (m-15)
- (C)06-21-82 4 FCC's motion to strike petitioner's 28(j) letter filed 6/16/82 (m-17)
- (C)06-21-82 4-FCC's motion for leave to file response to letter discussing additional authorities (m-21)
- (V)07-07-82 Per Curiam order that the motion to strike is denied; and that the motion for leave to file responses is granted and the Clerk is directed to file the lodged memorandum of the FCC responding to ITT's letter discussing additional authorities; SCJ Bazelon, Tamm and Mikva, CJs
- (T)09-17-82 4-Letter from counsel for FCC advising of additional authorities pursuant to FRAP 28(j)(m-16)
- (B)02-01-83 Opinion for the Court filed by Senior Circuit Judge Bazelon
- (B)02-01-83 Mandate Order
- (B)02-01-83 Judgment affirming in part, reversing in part and remanding the case to the District Court for further consideration and findings, all in accordance with the opinion of this Court filed herein this date.
- (J)02-14-83 4-Petitioner's bill of costs (m-11)
- (J)03-18-83 15-Respondent's (FCC) petition for rehearing and suggestion for rehearing en banc (m-18)

- (V)04-06-83 Per curiam order that respondent's petition for rehearing, filed 03/18/83, is denied; Tamm and Mikva, CJs and SCJ Bazelon
- (V)04-06-83 Per curiam order, en banc, that respondent's suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing en banc) (Circuit Judge Wald did not participate in the foregoing order)
- (S)04-14-83 Certified copy of opinion and judgment issued to Federal Communications Commission. Cost to issue at a later date.
- (V)04-25-83 Per curiam order that costs in the total amount of \$3,246.47 are awarded in favor of petitioner/cross-appellant (ITT World Communications, Inc.) and taxed against respondents/appellees (FCC and USA), jointly and severally. The Clerk is directed to transmit a certified copy of this order to the FCC as promptly as the business of his office permits; Tamm and Mikva, CJs and SCJ Bazelon
- (V)04-25-83 Certified copy of above order sent to FCC
- (J)07-06-83 Copy of letter from Clerk, Supreme Court dated 07-05-83 extending time to file petition for writ of certiorari to 09-03-83 in SC No. A-1042
- (J)09-20-83 Notice from Clerk, Supreme Court advising that petition for writ of certiorari was filed 09-02-83 in SC No. 83-371
- (J)11-01-83 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-371 on 11-31-83
- (J)11-02-83 4-Letter dated 11-01-83 from Clerk, Supreme Court asking that record be certified and transmitted to Supreme Court
- (J)11-07-83 Receipt dated 11-07-83 from Clerk, Supreme Court for certified record
- (J)11-09-83 Letter dated 11-04-83 from Chief Deputy Clerk to Clerk, Supreme Court transmitting certified record
- (J)11-09-83 Letter dated 11-08-83 from Chief Deputy Clerk to Clerk, Supreme Court enclosing certified copy of the judgment that was omitted from the file

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2401

ITT WORLD COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSIONER, APPELLEE

[*APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA*]

RELEVANT DOCKET ENTRIES

- (V)11-17-80 Copy of notice of appeal and docket entries from Clerk, District Court (n-2)
- (V)11-17-80 Docketing fee was paid in the District Court on 11-14-80
- (V)11-24-80 Certified Original Record (2 vols.); 1 vol. of Transcript under separate cover (n-3) (Also the record in 80-2324)
- (T)11-26-80 4-Appellant's motion for consolidation with Nos. 80-1721 and 80-2324 and to establish a briefing schedule (m-25)
- (T)12-05-80 4-FCC's response to motion for consolidation and to establish briefing schedule (m-5)
- (T)12-15-80 4-Appellant's reply in support of motion for consolidation and to establish briefing schedule (m-12)
- (B)01-02-81 Order per CJ Wright that the Clerk is directed to file FCC's opposition to the motion for consolidation and to establish a briefing schedule; and that the Clerk is directed to schedule these appeals (80-2324 and 80-2401) for argument on the same day and before the same panel with the petition for review proceeding in No. 80-1721; and that the time for filing plaintiff/cross-appellant's brief is extended for a period of 40 days from the date of this order. The further briefs in these cross-appeals shall be filed in accordance with Rules 28(h) and 31(a), F.R.A.P. utilizing fully the provisions of Rule 28(i), F.R.A.P. as to the briefs filed in No. 80-1721.

- (B)01-02-81 4-FCC's opposition to motion for consolidation and to establish a briefing schedule (m-5)—filed per above order
- (A)2-10-81 4-Appellant's consent motion for extension of time to file its brief (m-10)
- (T)02-17-81 4-FCC's motion to expedite scheduling of oral argument (m-13)
- (T)02-17-81 4-FCC's motion for stay pending appeal (m-13)
- (B)02-18-81 Clerk's order granting appellant's (ITT World Communications, Inc.) consent motion to extend time to file brief to 2-17-81
- (T)02-18-81 4-Appellant's emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-18)
- (T)02-18-81 4-Appellant's motion for leave to take the deposition of Willard L. Demory (M-18)
- (T)02-18-81 4-Appellant's motion for leave to file brief in temporary form (m-17)
- (T)02-18-81 4-Appellant's motion for leave to file brief in excess of page limitations (m-17)
- (T)02-18-81 15-Appellant's statutory appendix (m-17)
- (T)02-18-81 7-Joint Appendix (m-17)
- (B)02-20-81 Per Curiam order that appellant's motion for stay pending appeal is denied; and that appellant's motion to expedite is granted and the Clerk is directed to schedule this case for argument as soon after the filing of briefs as the business of the court permits; and that ITT World Communications, Inc., is granted leave to file in temporary form its brief in excess of the page limitations. This brief shall be considered filed in Nos. 80-1721, 80-2324 and 80-2401. Robb, Wald and Ginsburg (who did not participate), CJ's
- (B)02-20-81 4-Petitioner's (ITT World Communications, Inc.) brief (m-17)
- (T)02-20-81 4-FCC's motion to strike brief of ITT World Communications, Inc. (m-20)
- (T)02-20-81 4-FCC's opposition to motion for leave to take the deposition of Willard L. Demory (m-20)
- (T)02-20-81 4-FCC's opposition to emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-20)

- (C)02-26-81 Per Curiam order that the motion to strike brief is denied; Robb, Wald and Ginsburg (who did not participate), CJs
- (C)02-26-81 4-Respondent's opposition to motion for leave to file brief in excess, etc. (m-20). filed per above order
- (T)03-09-81 15-Appellant's (ITT World Communications, Inc.) brief (m-3)
- (C)03-10-81 4-FCC's motion to extend time to file brief to 4/16/81 (m-10)
- (C)03-16-81 4-ITT's response to FCC's motion to extend time to file brief (m-16)
- (T)03-7-81 4-FCC's motion to extend time to file brief to June 5, 1981 (m-27)
- (B)04-14-81 Order per CJ McGowan that the time for filing the brief of FCC is extended to and including June 5, 1981
- (T)05-26-81 4-Joint motion to defer briefing schedule (m-26)
- (B)06-01-81 Clerk's order granting the joint motion to defer briefing schedule and the filing of briefs herein is deferred pending the outcome of settlement negotiations among the parties. Respondent shall report to the Court on the progress of negotiations within 45 days from the date of this order and at 60 day intervals thereafter, if necessary
- (V)07-15-81 4-FCC's status report (m-15)
- (T)09-14-81 4-FCC's status report (m-14)
- (V)11-13-81 4-FCC's status report (m-13)
- (V)11-13-81 4-Letter from counsel of DOJ confirming statement made by FCC in their status report (m-13)
- (V)11-16-81 Letter dated 11/16-81 from counsel for appellant advising of status
- (B)12-01-81 Order per CJ Robinson that the briefs of the FCC and the Department of Justice be filed not later than January 15, 1982. All briefs in reply shall be filed not later than March 1, 1982.
- (V)01-15-82 4-Appellee's motion to extend time in which to serve and file brief, two working days (m-15)
- (C)01-19-82 Order per CJ Robinson that appellee's brief(s) may be filed by the close of business January 19, 1982 (80-1721)
- (B)01-22-82 Order per CJ Robinson that the Clerk is directed to file the lodged Commission's brief
- (B)01-22-82 15-Appellee's brief (m-19)

- (V)03-02-82 15-Appellant's reply brief (m-1)
- (B)04-09-82 Clerk's order, sua sponte, that the following times are allotted for the oral argument of this case: Appellant—15 minutes; Appellee—15 minutes. Only one counsel per side will be allowed to argue.
- (C)04-13-82 4-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-12)
- (C)04-16-82 ARGUED BEFORE SCJ Bazelon and Tamm and Mikva, CJs
- (C)06-16-82 4-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-15)
- (c)06-21-82 4-FCC's motion to strike ITT's 28(j) letter filed 6/16/82 (m-17)
- (C)06-21-82 4-FCC's motion for leave to file response to letter discussing additional authorities (m-21)
- (V)07-07-82 Per Curiam order that the motion to strike is denied; that the motion for leave to file responses is granted and the Clerk is directed to file the lodged memorandum of the FCC responding to ITT's letter discussing additional authorities; SCJ Bazelon, Tamm and Mikva, CJs
- (V)07-07-82 4-FCC's memorandum responding to letter discussing additional authorities (m-21)—filed per above order
- (B)02-01-83 Opinion for the Court filed by Senior Circuit Judge Bazelon
- (B)02-01-83 Mandate Order
- (B)02-01-83 Judgement affirming in part, reversing in part and remanding the case to the District Court for further consideration and findings, all in accordance with the opinion of this Court filed herein this date.
- (J)02-14-83 4-Appellant's bill of costs (m-11)
- (J)03-18-83 15-Appellee's petition for rehearing and suggestion for rehearing en banc (m-18)
- (V)04-06-83 Per curiam order that appellee's petition for rehearing, filed 03/18/83, is denied; Tamm and Mikva, CJs and SCJ Bazelon
- (V)04-06-83 Per curiam order, en banc, that appellees' suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey,

Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing en banc) (Circuit Judge Wald did not participate in the foregoing order)

- (S)04-14-83 Certified copy of opinion and judgment issued to Federal Communications Commission. Costs to issue at a later date.
- (V)04-25-83 Per curiam order that costs in the total amount of \$3,246.47 are awarded in favor of petitioner/cross-appellant (ITT World Communications, Inc.) and taxed against respondents/appellees (FCC and USA), jointly and severally. The Clerk is directed to transmit a certified copy of this order to the FCC as promptly as the business of his office permits; Tamm and Mikva, CJs and SCJ Bazelon
- (V)04-25-83 Certified copy of above order sent to FCC
- (J)07-06-83 Copy of letter from Clerk Supreme Court dated 07-05-83 extending time to file petition for writ of certiorari to 09-03-83 in SC No. A-1042
- (J)09-20-83 Notice from Clerk, Supreme Court advising that petition for writ of certiorari was filed 09-02-83 in SC No. 83-371
- (J)11-01-83 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-371 on 11-31-83
- (J)11-02-83 Letter dated 11-01-83 from Clerk, Supreme Court asking that the record be certified and transmitted to Supreme Court.
- (J)11-07-83 Receipt dated 11-07-83 from Clerk, Supreme Court for certified record
- (J)11-09-83 Letter dated 11-04-83 from Chief Deputy Clerk to Clerk, Supreme Court transmitting certified record
- (J)11-09-83 Letter dated 11-08-83 from Chief Deputy Clerk to Clerk, Supreme Court enclosing certified copy of the judgment that was omitted from the file

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2324

ITT WORLD COMMUNICATIONS, INC., APPELLEE

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

[*APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA*]

RELEVANT DOCKET ENTRIES

- (V)10-29-80 Copy of notice of appeal and docket entries from Clerk, District Court (n-3)
- (C)10-30-80 Notice from District Court containing amended notice of appeal
- (V)11-24-80 Certified Original Record (2 vols.); 1 vol. of Transcript under separate cover (n-3) (Also the record in 80-2401)
- (T)11-26-80 4-Appellee's motion for consolidation with Nos. 80-1721 and 80-2401 and to establish a briefing schedule (m-25)
- (T)12-05-80 4-FCC's response to motion for consolidation and to establish briefing schedule (m-5)
- (T)12-15-80 4-Appellant's rely in support of motion for consolidation and to establish briefing schedule
- (B)01-02-81 Order per CJ Wright that the Clerk is directed to file FCC's opposition to the motion for consolidation and to establish a briefing schedule; and that the Clerk is directed to schedule these appeals (80-2324 and 80-2401) for argument on the same day and before the same panel with the petition for review proceeding in No. 80-1721; and that the time for filing plaintiff/cross-appellant's brief is extended for a period of 40 days from the date of this order. The further briefs in these cross-appeals shall be filed in accordance with Rules 28(h) and 31(a), F.R.A.P. utilizing fully the provisions of Rule 28(i), F.R.A.P. as to the briefs filed in No. 80-1721.
- (B)01-02-81 4-FCC's opposition to motion for consolidation and to establish a briefing schedule (m-5)—filed per above order

- (A)2-10-81 4-Appellee's consent motion for extension of time to file its brief (m-10)
- (T)02-17-81 4-FCC's motion to expedite scheduling of oral argument (m-13)
- (T)02-17-81 4-FCC's motion for stay pending appeal (m-13)
- (B)02-18-81 Clerk's order granting appellee's (ITT World Communications, Inc.) consent motion to extend time to file brief to 2-17-81
- (T)02-18-81 4-Appellee's emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-18)
- (T)02-18-81 4-Appellee's motion for leave to take the deposition of Willard L. Demory (m-18)
- (T)02-18-81 4-Appellee's motion for leave to file brief in temporary form (m-17)
- (T)02-18-81 4-Appellee's motion for leave to file brief in excess of page limitations (m-17)
- (T)02-18-81 15-Appellee's statutory appendix (m-17)
- (T)02-18-81 7-Joint Appendix (m-17)
- (B)02-20-81 Per Curiam order that appellant's motion for stay pending appeal is denied; and that appellant's motion to expedite is granted and the Clerk is directed to schedule this case for argument as soon after the filing of briefs as the business of the court permits; and that ITT World Communications, Inc., is granted leave to file in temporary form its brief in excess of the page limitations. This brief shall be considered filed in Nos. 80-1721, 80-2324 and 80-2401; Robb, Wald and Ginsburg (who did not participate), CJ's
- (B)02-20-81 4-Petitioner's (ITT World Communications, Inc.) brief (m-17)
- (T)02-20-81 4-FCC's motion to strike brief of ITT World Communications, Inc. (m-20)
- (T)02-20-81 4-FCC's opposition to motion for leave to take the deposition of Willard L. Demory (m-20)
- (T)02-20-81 4-FCC's opposition to emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-20)
- (C)03-10-81 4-FCC's motion to extend time to file brief to 4/6/81 (m-10)
- (C)02-26-81 Per Curiam order that the motion to strike brief is denied; Robb, Wald and Ginsburg, CJS (CJ Ginsburg did not participate)

- (C)02-26-81 4-Respondent's opposition to motion for leave to file brief in excess of page limit and cross-motion to compel compliance with orders of 1/2/81 (m-20)—filed per above order
- (T)03-09-81 15-Appellee's (ITT World Communications, Inc.) brief (m-3)
- (C)03-10-81 4-FCC's motion to extend time to file brief to 4/6/81 (m-10)
- (C)03-16-81 4-ITT's response to FCC's motion to extend time to file brief (m-16)
- (T)03-27-81 4-FCC's motion to extend time to file brief to June 5, 1981(m-27)
- (B)04-14-81 Order per CJ McGowan that the time for filing the brief of FCC is extended to and including June 5, 1981
- (T)05-26-81 4-Joint motion to defer briefing schedule (m-26)
- (B) 06-01-81 Clerk's order granting the joint motion to defer briefing schedule and the filing of briefs herein is deferred pending the outcome of settlement negotiations among the parties. Respondent shall report to the Court on the progress of negotiations within 45 days from the date of this order and at 60 day intervals thereafter, if necessary.
- (V)07-15-81 4-FCC's status report (m-15)
- (T)09-14-81 4-FCC's status report (m-14)
- (V)11-13-81 4-FCC's status report (m-13)
- (V)11-13-81 4-Letter from counsel for DOJ confirming statement made by FCC in their status report (m-13)
- (V)11-16-81 Letter dated 11/12/81 from counsel for appellee advising of status
- (B)12-01-81 Order per CJ Robinson that the briefs of the FCC and the Department of Justice be filed not later than January 15, 1982. All briefs in reply shall be filed not later than March 1, 1982.
- (V)01-15-82 4-Appellant's motion to extend time in which to serve and file brief, two working days (m-15)
- (C)01-19-82 Order per CJ Robinson that appellants' brief(s) may be filed by the close of business January 19, 1982 (80-1721)
- (B)01-22-82 Order per CJ Robinson that the Clerk is directed to file the lodged Commission's brief
- (B)01-22-82 14-Appellee's brief (m-19)
- (V)03-02-82 15-Appellee's reply brief (m-1)

- (B)04-09-82 Clerk's order, sua sponte, that the following times are allotted for the oral argument of this case: Appellant—15 minutes; Appellee—15 minutes. Only one counsel per wide will be allowed to argue.
- (C)04-13-82 4-Letter from counsel for ITT advising of additional authorities pursuant to FRAP 28(j) (m-12)
- (C) 04-16-82 ARGUED BEFORE SCJ Bazelon and Tamm and Mikva, CJs
- (C)06-16-82 4-Letter from counsel for ITT World advising of additional authorities pursuant to FRAP 28(j) (m-15)
- (C)06-21-82 4-FCC's motion to strike ITT's 28(j) letter filed 6/16/82 (m-17)
- (C)06-21-82 4-FCC's motion for leave to file response to letter discussing additional authorities (m-21)
- (V) 07-07-82 Per Curiam order that the motion to strike is denied; that the motion for leave to file responses is granted and the Clerk is directed to file the lodged memorandum of the FCC responding to ITT's letter discussing additional authorities; SCJ Bazelon, Tamm and Mikva, CJs
- (V)07-07-82 4-FCC's memorandum responding to letter discussing additional authorities (m-21)—file per above order
- (B)02-01-83 Opinion for the Court filed by Senior Circuit Judge Bazelon
- (B)02-01-83 Mandate Order
- (B)02-01-83 Judgment affirming in part, reversing in part and remanding the case to the District Court for further consideration and findings, all in accordance with the opinion of this Court filed herein this date.
- (J)02-14-83 4-Appellee's bill of costs (m-11)
- (J)03-18-83 15-Appellant's (FCC) petition for rehearing and suggestion for rehearing en banc (m-18)
- (V)04-06-83 Per curiam order that appellant's petition for rehearing, filed 03/18/83, is denied; Tamm and Mikva, CJs and SCJ Bazelon
- (V)04-06-83 Per curiam order, en banc, that appellant's suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork

- and Scalia would grant the suggestion for rehearing en banc) (Circuit Judge Wald did not participate in the foregoing order)
- (S)04-14-83 Certified copy of opinion and judgment issued to Federal Communications Commission. Costs to issue at a later date.
- (V)04-25-83 Per curiam order that costs in the total amount of \$3,246.47 are awarded in favor of petitioner/cross-appellant (ITT World Communications, Inc.) and taxed against respondents/appellees (FCC and USA), jointly and severally. The Clerk is directed to transmit a certified copy of this order to the FCC as promptly as the business of his office permits; Tamm and Mikva, CJs and SCJ Bazelon
- (V)04-25-83 Certified copy of above order sent to FCC
- (J)07-06-83 Copy of letter from Clerk, Supreme Court dated 07-05-83 extending time to file petition for writ of certiorari to 09-03-83 in SC No. A-1042
- (J)09-20-83 Notice from Clerk, Supreme Court advising that petition for writ of certiorari was filed 09-02-83 in SC No. 83-371
- (J)11-01-83 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-371 on 11-31-83
- (J)11-02-83 4-Letter dated 11-01-83 from Clerk, Supreme Court asking that record be certified and transmitted to Supreme Court.
- (J)11-07-83 Receipt dated 11-07-83 from Clerk, Supreme Court for certified record
- (J)11-09-83 Letter dated 11-04-83 from Chief Deputy Clerk to Clerk, Supreme Court transmitting certified record
- (J)11-09-83 Letter dated 11-08-83 from Chief Deputy Clerk to Clerk, Supreme Court enclosing certified copy of the judgment that was omitted from the file

LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, N.Y. 10005

October 12, 1979

Executive Director
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20551

Re: REQUEST FOR INSPECTION OF RECORDS

Dear Sir:

On behalf of our client, ITT World Communications Inc., we hereby request, pursuant to the provisions of 5 U.S.C. § 552, copies of all correspondence, memoranda, records, minutes and other documents which refer or relate to:

1. Communications (whether or not occurring at a formal meeting) or possible communications involving FCC commissioners and/or staff personnel and representatives of foreign administrations and/or entities attending the recent US/CEPT/TELEGLOBE meeting in Dublin with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;

2. Communications or possible communications involving FCC commissioners and/or staff personnel and any person (whether American or foreign) with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;

3. The willingness of foreign correspondents to deal with or consider dealing with U.S. carriers not now providing international services through direct connections with foreign correspondents.

Pleadings filed in proceedings to which ITT World Communications Inc. was a party or opinions rendered in such proceedings need not be furnished.

It is our belief that none of the documents requested are of the kind described in 47 C.F.R. § 0.457. If any docu-

ments are withheld in reliance on that or any other provisions, we should appreciate it if the documents were identified with sufficient precision to permit us to understand the basis for such action and to seek a ruling with respect to it if we were to conclude that the documents are being improperly withheld.

We assume that the search fees attendant to this request will not be substantial and are prepared to pay any reasonable fees that are incurred. Please let us know if you anticipate that they will exceed \$100.

Very truly yours,

/s/ Grant S. Lewis
GRANT S. LEWIS

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

November 16, 1979

Grant S. Lewis, Esquire
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005

Re: Freedom of Information Act Request

Dear Mr. Lewis:

This letter is in response to your Freedom of Information Request, Control No. 9-192 dated October 12, 1979 and received in the FOIA Control Office. Your request specifically asks for the following material:

1. Communications (whether or not occurring at a formal meeting) or possible communications involving FCC commissioners and/or staff personnel and representatives of foreign administrations and/or entities attending the recent US/CEPT/TELEGLOBE meeting in Dublin with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;

2. Communications or possible communications involving FCC commissioners and/or staff personnel and any person (whether American or foreign) with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;

3. The willingness of foreign correspondents to deal with or consider dealing with U.S. carriers not now providing international services through direct connections with foreign correspondents.

By letter dated October 30, 1979 you confirmed that you were not seeking documents prepared prior to January 1, 1976 and you agreed to extend the FCC's time to respond to your request to November 13, 1979. In a subsequent telephone conversation with Joseph Marino of the Common

Carrier Bureau you agreed to a further extension to November 16, 1979.

We have conducted a thorough search of the Commission's files in response to your request including responsive materials focusing on the Dublin conference, *TAT-7*, Docket 18825 (French telephone excluded), *International Gateways*, Docket 18660, N. Atlantic Planning 1985-95, Docket 79-194, and Graphnet—Telnet matters located within the Common Carrier Bureau, General Counsel's Office and offices of Chairman Ferris and Commissioners Lee, Washburn and Fogarty. The materials which we have located are identified below and discussed in terms of their status under the Freedom of Information Act, 5 U.S.C. § 552 (1976).

I. MATERIAL AVAILABLE FOR INSPECTION

Some of the material relevant to your request is available for your inspection and is listed in Attachment I to this letter.

II. MATERIAL NOT AVAILABLE FOR INSPECTION

We have located a number of internal documents prepared by staff members of the Commission for internal purposes which are listed in Attachments II to this letter. Section 552(b)(5) of the Freedom of Information Act exempts from the general requirement of disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency...." 5 U.S.C. § 552(b)(5) (1976). This provision incorporates into the Freedom of Information Act limitations concerning discovery of internal agency material. In addition, Section 0.457 of our own Rules prohibits disclosure of internal agency work papers. That section provides:

(e) Interagency and intra-agency memorandums or letters, 5 U.S.C. 552(b)(5). Interagency and intra-agency memorandums or letters and the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance

with the procedures set forth in § 0.461. Only if it is shown in a request under § 0.461 that such a communication would be routinely available to a private party through the discovery process in litigation with the Commission will the communication be made available for public inspection. Normally such papers are privileged and not available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents.

Generally, all the documents listed in Attachment II fall within exemption 552(b)(5) and § 0.457(e) because they are all interagency and intra-agency memorandums, letters, work papers of members of the Commission or its staff. Exemption (5)(b) generally operates to protect "internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making process, but not purely factual or investigatory reports." *Soucie v. David*, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1077 (1971). Indeed, Congress intended to limit exemption (b)(5) to protect material of a deliberative or policy-making nature. *Senate Report on the FOIA Act* at 9.

The documents listed on Attachment II would not be available by law to a party in litigation. The rule in certain general discovery cases is that a privilege "obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and process are formulated". *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967). See also *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946, 141 Ct. Cl. 38 (1958).

Specifically, the documents listed in #1. a through e of Attachment II are internal documents created for internal use which would not be available in civil litigation and thus fall within the § 552(b)(5) exemption. The handwritten notes and typewritten compilation thereof listed in la

through e of Attachment II are privileged because they contain opinions, advice and deliberative materials reflecting the policy making process.¹ These documents all relate to a meeting held at the Dublin Conference. By design, the meeting was attended solely by agency representatives of the United States and various foreign governments. Further, it was understood by all government representatives that all statements made during the meeting would be held in confidence. The documents were generated to aid the Commission in construction of future international policy and contain FCC staff recollection of statements or representations of policy of foreign sovereigns. It is imperative that the Commission be able to engage in the free flow of information between other agencies of the U.S. Government and foreign governments in order to set intelligent and workable international telecommunications policies. The Court of Claims recognized the need of the government to retain certain internal documents from disclosure to the public in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958), where it held that internal opinionative material was privileged because of the need to protect intra-governmental communications and the administrative decision-making process.

If these documents were disclosed, a critical avenue by which the United States gains insight into the status of foreign governments' telecommunications policies and by which information on mutual vital interests is exchanged would be destroyed; the entire purpose of having such meetings to allow for a meaningful dialogue on matters of international scope—on a confidential basis—would be

¹ Ordinarily, handwritten notes made for the sole use and convenience of the author do not constitute agency records and are not subject to the requirements of disclosure contained in the Freedom of Information Act. See, *Porter County Chapter of Izaak Walton League v. United States Atomic Energy Commission*, 380 F. Supp. 630 (N.D. Ind. 1974). However, the notes in 1. a through e were generated for internal agency use.

comprised.² The final result of blotting the free exchange of information would be inimical to the public interest.

Documents #2a through #2f and #3 on Attachment II are draft versions of the final copies of the Telexes listed on Attachment I. The drafts come within exemption (b)(5) because they reflect the mental processes of the staff members of the agency in advising the Chairman as to the final written formulation of telecommunications policy.

Document #4 on Attachment II is an internal memo from a staff lawyer to the then Chief of the Common Carrier Bureau. It is an internal memo containing legal advice and opinions on the applicability of the resale decision to the international communications market. Hence, it is protected from disclosure and falls within the (b)(5) exemption.

Document #5 on Attachment II is an internal paper written by two members of the Common Carrier Bureau staff containing their opinions, advice and deliberative considerations on the subject of the expansion of areas of consultative contact. It is intended only as background information for other members of the Commission who would attend the Dublin Conference. It consists of judgmental evaluations by the staff which "cited, discarded, compared, evaluated and analyzed," *Montrose Chemical Corporation of California v. Train*, 491 F.2d 63, at 68 (1974), to assist the attendees of the meeting in formulating policy statements and determinations. The document contains the mental processes of the agency's staff, a process which the requesting party is not entitled to probe. *Id.* Hence, it too falls within exemption (b)(5) of the FOIA Act and will be withheld.

Documents #6 and #7 are two background memorandum papers written by a staff attorney containing his legal opin-

² This is, of course, not to say that public input to the process is unimportant. Most of the consultative process is conducted on a public basis, and certainly any FCC rules and regulation promulgated pursuant to the process are made subject to the public procedures required under the Administrative Procedure Act. Thus, the opportunities for notice to and comment by the public are numerous. These opportunities reaffirm our belief that certain stages of U.S. interface with foreign governments requiring sensitive discussion of nascent policy positions should be permitted the flexibility of non-public, confidential treatment.

ions of Section 214 of the Communications Act and his advise and legal conclusions. These documents contain deliberative and conclusionary material and are not discoverable by law to a party in litigation. They therefore are exempt from inspection and will not be disclosed under (b)(5).

Document #8 is a draft of a proposed speech for Chairman Ferris to deliver at the Dublin Conference written by a member of his staff. The remarks were never made; the words never spoken. The document reflects the deliberative internal agency mental processes and as such is exempt from disclosure under (b)(5).

Document #9 is a memorandum prepared for Commissioner Washburn by one of his aides containing advice and recommendations on an agenda item before the Commission in the fall of 1976. It clearly contains material of a deliberative and policy-making nature. It is not subject to disclosure and falls within the (b)(5) exemption.

Documents #10 through #14 were prepared for Commissioner Fogarty by his legal assistants and contain legal advice concerning the matters indicated in Attachment II. As such the documents are privileged and fall within the (b)(5) exemption.

Document #15 is a memorandum prepared by Commissioner Fogarty for Chairman Ferris regarding the DOD Briefing on National Defense Requirements for Additional International Cable Facilities. It contains opinions on a policy matter pending before the Commission and therefore falls within exemption (b)(5) as discussed above.

III. ARRANGEMENT FOR INSPECTION AND RIGHT OF APPEAL

You may arrange to examine the material listed on Attachment I as available for inspection by contacting Mary Fitzwater of the Compliance and Litigation Task Force in Room 6206, 2025 M Street, N.W., Washington, D.C. telephone number 632-4890. Copies may be obtained through the Downtown Copy Center, 1114 — 21st Street, N.W. Washington, D.C., telephone number 452-1422.

Pursuant to Section 0.461(i) of the Commission Rules, a copy of which is enclosed, you may seek review of the Bureau's action. Any such application for review shall be filed

within 30 days after the date of our ruling and delivered or mailed to the General Counsel.

Philip L. Verveer, Chief, Common Carrier Bureau and Robert R. Bruce, General Counsel, are the officials responsible for the decision to withhold certain of the materials listed above.

Sincerely,

/s/ Philip L. Verveer

PHILIP L. VERVEER

Chief, Common Carrier Bureau

ATTACHMENT I

Material Available for Inspection

1. Copy of Telex from Chairman Charles Ferris to Mr. Jean-Claude DeLorme, President of Teleglobe Canada, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.

2. Copy of Telex from Chairman Charles Ferris to Mr. Torsten Larsson, Chairman of CEPT/CLTA, Central Administration of Swedish Telecommunications, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.

3. Five pages, pp. 106-111, of Transcript of CEPT/U.S.A./Teleglobe Canada, concerning consultative process on North Atlantic Telecommunications, Montreal, Canada, March 22-23, 1979.

4. Telexes, 8/5/77, 6/3/77.

5. A letter dated March 1, 1979, to Mr. Robert Bruce, FCC, from Mr. Robert Seguin of Teleglobe Canada, with attachments.

6. Letter dated September 21, 1979, to Commissioner Fogarty from Bertram B. Tower, ITT World Communications.

7. Telex dated March 13, 1979 from Robert Seguin of Teleglobe Canada to Robert R. Bruce, Esq., General Counsel, FCC and Mr. Enrico Birzzi, of Italcable, Rome, Italy, concerning a conference report to be given at the Montreal, Canada, March, 1979 consultative meeting.

8. Teled dated March 20, 1979 from Robert R. Bruce, Esq., General Counsel, FCC to Mr. Enrico Brizzi, Chairman, CEPT/STA, Italcable, Rome, Italy, concerning the future of the consultative process.

ATTACHMENT II

Material Not Available for Inspection

1. Documents generated due to an off-the-record meeting on October 3, 1979 among representatives of CEPT, Canada, NTIA, DOS and FCC in Dublin, Ireland, including:

- a. Handwritten notes of R.E. Gosse, Esq.
- b. Handwritten notes of James Warwick.
- c. Typewritten draft of compilation of Gosse and Warwick notes prepared by R.E. Gosse, Esq.
- d. Copy of typewritten draft of compilation of notes as described in "c" above with James Warwick's suggested changes.
- e. Copy of typewritten draft of compilation of notes as described in "c" above with Thomas J. Casey's, Esq. suggested changes.
- f. Handwritten notes from Thomas J. Casey, Esq. to Robert E. Gosse, Esq. regarding typewritten compilation.

2. Drafts of the October 31, Telexes in #2 of Attachment I from Chairman Ferris to Mr. Torsten Larsson, Chairman of CEPT/ELTA, Central Administration of Swedish Telecommunications on the following dates:

- a. 10/24/79
- b. 10/26/79
- c. 10/29/79
- d. 10/30/79
- e. 10/30/79
- f. 10/31/79

3. Draft of October 31 Telex in #1 of Attachment I from Chairman Ferris to Mr. DeLorme on 10/30/79.

4. Memorandum dated August 25, 1976 from Joel S. Winnik, Esq. to Walter R. Hinchman, Chief, Common Carrier Bureau, on subject of Applicability of Resale Decision to International Communications market.

5. Memorandum entitled "Expansion of Areas of Consultative Contact" prepared by R.F. Gosse, Esq. and James Warwick in September, 1979, for background for FCC attendees of Dublin, Ireland Conference.

6. Background memo undated from Russell Frisby, Esq. to James Smith Esq. prepared in September, 1979, for FCC attendees of Dublin, Ireland, regarding Section 214 Applications for provision of International Service.

7. Background memo undated prepared in September, 1979, from Russell Frisby, Esq. to James Smith, Esq. for FCC attendees of Dublin, Ireland on CCI and International Television.

8. Unused draft prepared by his staff for Chairman Ferris' opening remarks for Dublin, Ireland conference.

9. Memorandum dated October 15, 1976 prepared by Sebastian A. Lasher for Commission Abbott Washburn regarding the revision of authorization of Graphnet Systems, Inc. to comply with decision of U.S. Court of Appeals, 2nd Circuit in No. 77-4028.

10. Memorandum, dated December 16, 1976, to Commissioner Fogarty from Angela Shaw, the Commissioner's Attorney-Advisor, on the subject of the December 20, 1976 Reston meeting;

11. Undated memorandum to Commission Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, summarizing Common Carrier No. 1, Special Meeting of October 25, 1978, re: TAT-7, Docket No. 18875 reconsideration;

12. Undated memorandum to Commissioner Fogarty from Lawrence Katz, the Commissioner's Attorney-Advisor, on Item No. 1 for the Special Meeting of February 22, 1979, re: Docket 18875, Phase III;

13. Undated memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: Trans-atlantic Communications Facilities/Planning;

14. Undated memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: Trans-atlantic Communications Facilities/Comments on AT&T's August 31 filing;

15. Memorandum from Commissioner Fogarty to Chairman Ferris, dated October 5, 1978, re: DOD Briefing on National Defense Requirements for Additional International Cable Facilities;

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. RM-3523

In the Matter of

ITT WORLD COMMUNICATIONS INC.

Petition for Rulemaking Concerning
Contacts Between the F.C.C. and
Foreign Telecommunications
Administrations With Respect to
Future International Communication
Services and Entry of New Common
Carriers

PETITION FOR RULEMAKING

ITT World Communications Inc. (ITT Worldcom) pursuant to Section 4(e) of the Administrative Procedure Act, 5 U.S.C. Section 553(e), and Section 1.401(a) of the Commission's Rules, hereby petitions the Commission to adopt rules of practice and procedure, consistent with its statutory authority, to regulate its contacts with foreign administrations and telecommunications entities to ensure that neither the rights of existing U.S. international service carriers are prejudiced, nor the integrity of the Commission's processes is in any way compromised. In support of its petition, ITT Worldcom submits as follows:

PRELIMINARY STATEMENT

ITT Worldcom has been advised that the Commission, through its Telephone and Telegraph Committee and Staff, contemplates private contacts with foreign administrations and telecommunications entities, particularly the members of CEPT, in order to discuss such subjects as the provision of future international telecommunications services, and the proposed entry of new U.S. common carriers into international services by way of direct operating relationships with foreign carriers.

ITT Worldcom questions the wisdom of such proposed activities, and contends that the Commission lacks authority to participate in them. If, however, the Commission so intends, ITT Worldcom respectfully proposes that it must, at the outset, adopt rules of practice and procedure to govern all contacts with foreign entities. Such rules should define with care, both what the Commission may undertake to do, and the manner in which it may proceed. In this pleading, ITT Worldcom will first address the underlying policy considerations (Part I, "the what"), including *inter alia*, the Commission's purpose for meeting with foreign administrations, the authority and obligations of the participating Commission representatives and the areas appropriate for discussion; thereafter, it will propose a procedure (Part II, "the how") to govern the manner in which such discussions may be conducted so as to afford due process protection to all existing international service carriers who operate under the jurisdiction of the Commission, and all other parties interested in the effects, both direct and indirect, of such Commission dialogues with foreign administrations. Finally, ITT Worldcom will set out its statement of Proposed Rules for Commission consideration (Part III, pp. 22-25).

The proposed rulemaking should, at the minimum, request comments and responses as to all the issues raised herein regarding both policy and procedures for such contacts. The Commission might also proceed by Notice of Inquiry should it determine that to be the more orderly manner.

I. THE COMMISSION CANNOT PARTICIPATE IN A DIALOGUE WITH FOREIGN ADMINIS- TRATIONS ABSENT CLEAR CUT LEGAL AND JURISDICTIONAL AUTHORITY

It is imperative at the threshold that the Commission issue a policy statement delineating the proper scope of proposed meetings with foreign administrations and telecommunications entities and the authority of Commissioners and staff to participate in such meetings.

**A. Neither The Commission Nor Its Members May
"Negotiate" With Foreign Governments Or
Entities**

It is self-evident that the Commission lacks the legal authority to "negotiate" with foreign governments, on behalf of the United States, such power being reserved to the President and the State Department. Such limitations have been acknowledged countless times in recent history.¹

Among nations which participate in the provision of international telecommunications services, the United States is unique in that its service is not provided by the government or a quasi-governmental entity, but by regulated private industry, operating in a competitive marketplace. The Commission, because it must ultimately review all applications of the U.S. international service carriers for the construction of new international facilities, has been urged by the CEPT administrations to consult on such issues as planned cable facilities so that the international service carriers do not negotiate with them in a void. And, to date, the Commission has exercised care in consulting rather than negotiating with foreign administrations, limiting its involvement to the exchange of factual information of mutual concern.

However, recent statements by various Commissioners and Commission Staff seem to be leading the Commission into dangerous new ground by appearing to tie TAT-7 authorizations, for instance, to notions of reciprocity, a term

¹ In a letter to CLTA Chairman Larsson, regarding the "consultative process," Chairman Ferris stated: "*the Commission cannot engage in discussions which might be construed as negotiation of differences between the present U.S. and CLTA/Teleglobe facilities plan. Facilities plans of all concerned entities must be developed independently in accordance with our respective national interests, goals and statutory obligations.*" (Emphasis supplied).

The then Chief of the Common Carrier Bureau, following the first subconsultative assembly in Munich (Germany, October 28 through 30, 1974) similarly stated on November 26, 1974, at an open Commission meeting. See also *Overseas Communications*, 67 F.C.C.2d 353 (1977).

which is not synonymous with "comity" or even necessarily consistent with it.²

Because any proposed dialogue with Europeans (or other overseas administrations) on the subject of new U.S. international services and entities, must be held against the backdrop of Section 1 of the Communications Act, 47 U.S.C. Section 151, and the Commission's mandate to foster a rapid and efficient worldwide telecommunications system, the Commission has an affirmative responsibility to cooperate with foreign telecommunications entities toward achievement of that goal. In the absence of clear-cut policy provisions, foreign administrations could misinterpret statements made by the Commissioners as efforts to negotiate with them, or to represent the United States in foreign policy matters with them, even though such objectives would be outside the scope of Commission authority.

² Commissioner Fogarty, for instance, issued a separate statement on February 26, 1979, 71 F.C.C.2d 64, 97, which included the following remarks (at 99):

"Coupled with the need for circuit planning is the necessity for the foreign correspondents to recognize our competitive policies. Many other foreign correspondents have balked at dealing with more than a small number of United States carriers. The specialized carriers which we have authorized to offer international services have met with almost universal opposition when seeking operating arrangements abroad. Now that the Commission has considered and, to some degree, deferred to the policies and expressed needs of the foreign governments, we should expect "tit for TAT" from the Europeans in terms of *their* recognition of our competitive policies and *their* agreement to deal with *our* multiplicity of carriers. Without such reciprocity, I cannot see how we can give any weight or consideration to the Europeans' internal needs and policies in our future dealings. In the final analysis, reciprocity must be a two-way street, a dialogue rather than a monologue." (Emphasis in original).

Additionally, a Docket 18875 "Sunshine Meeting" dialogue between Commissioner Lee and the then Chief of the Common Carrier Bureau, on November 23, 1977, included an exchange regarding the CEPT nations, in which Commissioner Lee indicated that he was sensitive to comity, which must be a two way street. He asked if there were any recent instances when it went the other way. The Bureau Chief replied that the CEPT members had recently indicated they had no desire to work with the value added carriers, Graphnet and Telenet.

Concerns of foreign administrations that the Commission intends to exercise jurisdiction over them have been expressed in the context of North Atlantic Planning. In a telex message dated November 2, 1978, CEPT/CLTA Chairman Larsson stated:

"We have made it plain on several occasions that as representatives of sovereign countries the CEPT administrations cannot be subject to the jurisdiction of U.S. authority."

Even if the Commission intends that subsequent meetings with foreign representatives will involve only the exchange of information regarding new entries, it should indicate in advance, its understanding of the word "comity" in that limited context. In *Overseas Communications*, 67 F.C.C.2d 358, 418 (1977), the Commission, when discussing what "comity" required of it when presented with the views of the European governments, stated that all "comity" means is "having one's views considered as well as considering the views of others" and that "each party to the international communications joint venture provide ... in support of its views concerning possible facility programs, the most comprehensive information available..." It thus suggested that, so long as it considered the views of the Europeans, it was free to reject them, and go on to do whatever it pleased.

This view is a mistaken one, as it implies that overseas administrations are little more than supplicants under the Commission's jurisdiction, whose views are entitled to no more consideration than those of private parties. But no definition of international comity can disregard the sovereign status of the overseas administrations. Indeed, comity does not exist absent sovereignty. See *Hilton v. Guvot*, 159 U.S. 113, 163-64 (1895).

The meetings proposed by the Commission are similar, in many respects, to the "summit meetings" between individual Commissioners and the broadcast industry which were at issue in *Writers Guild of America, Inc. v. F.C.C.*, 423 F. Supp. 1064, 1157 (C.D. Cal. 1976); although such meetings involved entities *within* the jurisdiction of the agency, language in that decision suggests the need for an unequiv-

ocal policy statement, indicating that the Commission has no intention of coercing the foreign administrations:

Without choosing actively to regulate future FCC conduct in this area, the court notes that such summit meetings are extraordinary, unnecessary to achieve an objective of merely making suggestions, sure to generate undue pressure and to create an appearance of impropriety, and strongly indicative of an FCC intent to compromise broadcaster decisionmaking. Moreover *FCC suggestions unaccompanied by clear and unequivocal denials of an intent to regulate take on the appearance of threats.* The Commission and its representatives must avoid the appearance of impropriety if respect for its processes is to be maintained. (Emphasis supplied).

See also, *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). The policy statement which ITT Worldcom suggests will merely restate the limitations which are applicable, as a matter of law, to the Commission representatives who attend any meeting with foreign administrations.

B. The Commission Must Articulate Rules To Ensure That It Does Not Advance Positions Or Articulate Viewpoints Which Effectively Prejudge Pending Or Future Decisions

The Commission should address in its rulemaking, the propriety of solicitation of information *from*, and presentation of its position *to*, foreign administrations particularly as regards related matters pending before the Commission, or related proceedings which are expected to arise in the future.

The due process problems which arise upon receipt of off-the-record information will be discussed below (Point II C, pages 18-22). As a matter of policy, however, the proposed rules should prohibit the Commission or any of its members or Staff from advancing positions or articulating viewpoints which will necessarily compel it to prejudge proceedings upon which it will later be expected to make a judgment.³

³ Commission regulations proscribe employee conduct which might result in or create the appearance of providing preferential treatment to any person; losing complete independence or impartiality, or making

If, for instance, the Commission were to make known to foreign administrations its desire that the international administrations enter interconnection agreements with U.S. carriers not yet providing international service through direct connections with foreign carriers, thereby placing itself in an advocacy posture, it would, by definition, be committing itself to affirmative decisions granting applications by those carriers currently pending before it. Such open dockets include *Graphnet Systems, Inc.*, 67 F.C.C.2d 1020, issued upon reconsideration, released April 3, 1979. (FCC 78-181); and its motion for "expedited reconsideration," File Nos. I-P-C-11 and I-P-C-11+A, FCC 79-249, released May 4, 1979; Graphnet's Application for Supplemental Authority to Provide Certain Digital Communications Services to Terminals located in [11 European countries], File No. I-P-C-59; AT&T's application to provide international Dataphone service, Docket No. 19558; GTE Telenet's application to provide international service (*ITT Worldcom v. F.C.C.*, No. 77-4028 remanded by 2d Cir., as Commission File No. I-T-C-2634); FTC Communications's application to provide international record services via San Francisco, Ca. and Washington, D.C., (file No. I-T-C-2650), remanded to the Commission by the Second Cir. Court of Appeals on July 17, 1979 and re-opened under No. FCC 79-452. In addition, there are pending informal complaints filed by ITT Worldcom and Western Union International, Inc. against Consortium Communications International, Inc. (CCI), (File Nos. TS 9-78 and TS 78-1945) and letters have been transmitted to the Commission asking it to take appropriate actions against Western Union Telegraph Company, for its illegal entry into international telecommunications. The Commission also has before it the ARINC Petition for Partial Reconsideration of the TAT-7 Authorization (Docket No. 18875), and the second Computer Inquiry (Docket No. 20828).

Each of these matters deals with the provision of international telecommunications services within the current pur-

a governmental decision outside official channels. 47 C.F.R. Section 19, 735-201 a (b), (d), (e).

view of the Commission. If the Commission in any way attempts to convince the international administrations to enter interconnection agreements involving Graphnet, GTE Telenet or CCI, it will have effectively prejudged those pending matters. It might also commit itself informally to a position on other proceedings as well.⁴ In this way, it will preordain results in these matters, by virtue of what it says as well as what it hears.

A report by the Comptroller General of the United States, "Greater Coordination and More Effective Policy Needed for International Telecommunications Facilities," March 31, 1978, dealt with a similar issue as regards the Commission's "instructional process" to Comsat at Intelsat proceedings in advance of Commission rulings on Comsat's Section 214 applications. The report stated (at 43):

Department of State and OTP officials, as well as a former responsible FCC official, felt that FCC had lost its options for ruling on Comsat's pending Section 214 application to participate in the Intelsat V program. In particular, an OTP official felt that instructions given through the instructional process bind FCC to a particular course of action in later deciding on Comsat's Section 214 application. As an example, this official stated that *if FCC gave Comsat an instruction to vote for a particular facility acquisition, FCC could not in a later Section 214 hearing decide that Comsat could not utilize the facility or include the facility in its rate base.*

Comsat officials shared OTP's viewpoint. They told us they believe that an instruction containing approval or offering no objection to Comsat voting for a particular facility commits FCC to approve Comsat's Section 214 application." (Emphasis supplied).

Committee or Commission statements might even pre-empt the outcomes of proceedings not yet begun, such as

⁴ Furthermore, the Commission's failure to encourage interconnections with IRCs to European telephone circuitry, for dataphone-type services, might indicate to the foreign administrations an unwillingness on the part of the Commission to approve such arrangements, and might predetermine the outcome of such proceedings before it.

follow-on facilities to Intelsat V or further cable applications.⁵

The prejudgment issue has arisen before. In *Cinderella Career and Finishing School, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) the D.C. Circuit Court of Appeals remanded a proceeding to the Federal Trade Commission and disqualified its Chairman, Paul Rand Dixon from further involvement, on the basis of a speech which he had made while the matter was pending, which indicated prejudgment of that matter.

"Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." (425 F.2d at p. 590).

See also, *Gilligan, Will & Co. v. FTC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert denied*, 361 U.S. 896; and *Texaco Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1969), vacated and remanded on other grounds, 381 U.S. 739.

The same legal issue is presented here. The Commission cannot retreat from a partisan position once taken, so as to maintain even the appearance of neutrality in considering related applications before it.

C. The Commission Should Preliminarily Determine Which Services And Carriers Will Be The Subject Of Its Discussions With The Europeans

Should a legal means be rationalized for engaging in such information gathering, the Commission should examine, with care, the issue of which services and carriers should be the subject for discussion, as the very selection of questions posed to foreign administrations and telecommunications entities may convince them that the Commission is

⁵ ITT Worldcom recognizes that the Telephone and Telegraph Committee members might recuse themselves from participation in the proceedings cited herein and any other matters relevant to the proposed discussions. Such action, however, would not only deprive the Commission of three of its members on vital issues; it would also render the Committee's contacts with the foreign administration useless.

sponsoring certain services and carriers to the detriment of others.⁶

For instance, should international Dataphone type service be explored, as well as packet switching systems? Is the Commission not obliged, in selecting carriers for discussion with foreign administrations, to scrutinize each carrier's current status, including, for instance, the fact that both GTE Telenet and Graphnet have access to United States customers without the gateway limitations which inhibit the international service carriers? Should not the Commission examine the degree to which a particular carrier dominates or monopolizes a particular service, for instance, AT&T's Dataphone or GTE Telenet's dominant position in domestic packet switching?

In discharging its duty to represent the public interest, the Commission, as an administrative agency, has an existing obligation to measure the impact of its decisions against the "fundamental national economic policy" expressed in the antitrust laws.⁷ As one court has observed:

"[A]ntitrust policy is of such national importance that regulatory agencies should apply that policy *sua sponte* in order to discharge their duty to represent the public interest."⁸

Commission involvement in the selection process contemplated raises serious antitrust questions, which must be resolved at the outset. If the Commission intends, by its meetings with foreign entities, to foster competition, preliminary proceedings must determine first, that the services and carriers selected do not, by their very nature, subvert the legitimate forces of marketplace competition.

⁶ ITT Worldcom submits that such crucial judgments cannot be made without on-the-record input from U.S. entities as well as others willing to provide information. See Point II C below.

⁷ *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966).

⁸ *Martin-Trigona v. F.R.B.*, 509 F.2d 363, 367 (D.C. Cir. 1975). The Commission itself has recognized that the prevention of anticompetitive conduct by a monopoly carrier is "imperative and in the public interest." *AT&T*, 50 F.C.C.2d 501, 511 (1974).

II. THE COMMISSION CANNOT PARTICIPATE IN A DIALOGUE WITH FOREIGN ADMINIS- TRATIONS ABSENT RULES SAFEGUARDING THE DUE PROCESS RIGHTS OF ALL INTER- ESTED PARTIES

Should the Commission determine, on the basis of the foregoing policy evaluation, that it may proceed with an exchange of information with foreign administrations and communications entities, it must lay the formal groundwork for such activity by way of a rulemaking which will ensure that the due process rights of the existing international service carriers and other interested parties are, in no way, abridged.

A. Such Rules Should Ensure That Proper Notice Of All Meetings Be Given In A Timely Manner

The Commission should undertake to provide public notice of all intended meetings with foreign authorities and the subjects earmarked for exploration.

In addition to considerations of fundamental fairness, there are important practical reasons for providing the interested carriers notice of any proposed meeting with foreign carriers, and an opportunity to comment on the subjects which the Commission proposes to discuss. First, the interested carriers will identify subjects which should not be discussed because they relate to pending or contemplated proceedings; the carriers may also be able to suggest additional subjects for discussion which are necessary to give the Commission a fuller understanding of a problem area.

Moreover, the international service carriers, which must obviously work closely with the foreign administrations, can assist the Commission in determining, at the threshold, whether a given subject is likely to be a fruitful area for discussion and how the foreign administrations may react to the subjects which the Commission proposes to discuss. Furthermore, the Commission will obviously be more fully prepared to engage in discussions with foreign administrations if the American carriers are provided the opportunity to give the Commission the benefit of their financial and op-

erational views and experiences regarding the subjects to be discussed.

B. Such Meetings Should Be Held In Public

A rule ensuring that all meetings with foreign administrations and telecommunications entities should be open to all interested parties comports with the doctrine that public business should be conducted in public, as expressed in the Government in the Sunshine Act, 5 U.S.C. Section 552b.

Until the Commission has expressed its policy intent with regard to the planned meetings (pursuant to Point I, *supra*), it is difficult to ascertain whether the Sunshine Act is directly applicable to such meetings. It would, of course, apply, if the proposed meetings advance beyond the mere exchange of information.⁹ In any event, the *policy* expressed in the Sunshine Act that: "the public is entitled to the fullest practicable information regarding the decision-making process of the Federal Government," should be applicable to even a meeting with foreign administrations for the exchange of data and ideas.

In view of this policy, and the obvious interest which the international carriers have in participating in the meetings with foreign administrations, the Commission should provide by rule that the meetings be open to the public except in those exceptional instances in which the full Commission expressly decides, under the guidelines of the Sunshine Act, that a particular meeting must, for good cause, be held in private.

In the event of its exclusion, any interested party should be notified in advance, in writing, of the Commission's rationale for such exclusion, as a party is entitled to know the grounds for an administrative determination which is adverse to his interest. 5 U.S.C. Sections 553, 557. A similar provision of the Sunshine Act, 5 U.S.C. Section 552b(f)(1), requires the agency to certify publicly its reasons for holding a closed meeting. See, also, 47 C.F.R. Section 0.605(c)(2), (d)(2).

⁹ Should that occur, the provisions of 47 C.F.R. Section 0.601 through 0.607, which require open meetings except in narrowly limited circumstances, would also apply.

Notification in advance of its exclusion is necessary to permit the excluded party to advise the Commission of any reason why such exclusion is erroneous, and to take any other steps which may be necessary to protect its rights. For example, ITT Worldcom believes that it and the other international carriers were excluded from the recent meeting in Dublin between Commission members and foreign administrations because the Commissioners felt that the antitrust laws so required. On the contrary, the antitrust laws may be violated when interested parties are denied an opportunity to participate. If ITT Worldcom had been advised of such concerns in advance of the scheduled meeting, it would have had an opportunity to convince the Commission, or a judicial tribunal, that such concern about the antitrust laws was misplaced.

C. All Meetings With International Entities Must Be Held On The Record

As discussed, *supra*, at p. 8, the Commission or Committee members must exercise caution to avoid prejudgment, or even the appearance of prejudgment, of issues involved in pending proceedings. It is also imperative, as a matter of basic due process protection, that Commission members attending off-the-record discussions minimize the possibility of receiving information upon which they could rely, when deciding pending (or prospective) proceedings.¹⁰ See the

¹⁰ As stated in fn. 3, *supra*, the Committee members could disqualify themselves from participation in such proceedings. They would also have to refrain, however, from briefing the other Commissioners on what they have heard, so as not to taint the record, thereby rendering the information gleaned from foreign entities of no practical value. Furthermore, even exercising the utmost caution, Committee members might well run afoul of due process requirements. As stated in *Berkshire Employees Assn. of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3rd Cir. 1941):

"Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

See also, *Cinderella Career*, *supra*, at 592 and *American Cyanamid Co. v. FTC*, 363 F.2d 757 (D.C. Cir. 1966).

Commission's *ex parte* rules, 47 C.F.R. Section 1.1201 through 1.1251.

The Commission (or any of its members) are interdicted from discussing, at *ex parte* meetings with others, any factual issues relevant to ongoing rulemaking or adjudications.¹¹ In this regard, see *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977); *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970); and *Sangamon Valley Television Corp. v. United States*, 264 F.2d 221 (D.C. Cir. 1959).

It is well established that if the Commission uses information obtained from foreign administrations as the basis for any future administrative decision, the Commission will be obliged to place all such information on the record at that time. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *HBO, supra*; *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). Disclosure of the information on which the Commission relies is required because it "not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion." *HBO, supra*, 567 F.2d at 55. Moreover, such disclosure is necessary to permit effective judicial review. *Overton Park, supra*; *HBO, supra*; *Portland Cement, supra*.

Should the Commission rely on information from the foreign administrations in any future decision, two serious problems will arise: (1) ascertaining the basis of the Commission's factual knowledge and (2) assuring that interested parties will have an adequate opportunity to rebut or challenge the information provided by the foreign administrations.

The proposed regulations deal with these procedural problems in several ways. First, the regulations require all

¹¹ Even in informal rulemaking, the *ex parte* proscriptions apply in cases of "selective treatment of competing business interests of great monetary value." *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, Order, Notice of Inquiry and Interim Policy Statement, FCC 78-405, Released June 14, 1978, Gen. Docket No. 78-167, Para. 6 (quoting Judge MacKinnon's concurring opinion in *HBO, supra*).

meetings with the foreign administrations to be conducted on the record, with a full transcript or recording available to the public. Thus, if the Commission should decide to use information obtained from foreign administrations in any future proceeding, interested parties will have full access to *all* of the factual information which was provided to the agency, and will be able to undertake their own analysis or explanation of that information when they present their own cases to the Commission.

Preserving a record of the information provided by foreign administrations will not, however, eliminate the possibility that interested parties will be unfairly prejudiced if that information is used in a future proceeding. The foreign administrations are not subject to the Commission's jurisdiction, cannot be cross-examined and cannot be compelled to provide interested parties with additional information during the Commission proceedings where their data will be used. Any carrier that is adversely affected by the use which the Commission makes of the foreign administrations' information will therefore have no adequate remedy if the Commission's assessment is made on the basis of information which is incomplete or inadequate. *See, e.g., HBO, supra, and Portland Cement, supra, 393. See, generally, Moss v. C.A.B., supra.* The only sure way of preventing prejudice to the interested carriers is to allow them to participate in meetings with the foreign administrations, and to place their own views on record, so that the information obtained by the Commission contains a complete record of the views of all knowledgeable and interested parties.

STATEMENT OF PROPOSED RULES

By reason of the foregoing, it is plain that the Commission must, at the threshold, face the issue of whether its contemplated course is a permissible one. If it so finds, it must adopt both new rules of policy which clearly delineate the purpose for meetings with the foreign administrations, and the authority and obligations of the Commission representatives who participate in them, and new rules of procedure which will afford due process to the carriers and other

parties interested in the Commission's meetings with the foreign administrations. Accordingly, ITT Worldcom proposes that the Commission adopt, pursuant to section 4(i) of the Communications Act, 47 U.S.C. Section 154(i), a statement of policy and procedure to read substantially as follows:

"(1) The Commission recognizes that the sole purpose of its meetings with foreign administrations is to exchange information of mutual interest. The Commission expressly disclaims any intention to negotiate with foreign administrations, or to attempt to subject sovereign states (or those exercising the jurisdictional powers of such states) to its regulatory jurisdiction.

(2) The Commission also recognizes that Commission representatives who attend any such meetings have not been delegated authority to make regulatory decisions on behalf of the entire Commission, and that any statements which the representatives may make at the meetings therefore are made on their own behalf and are not binding either upon the Commission or the United States.

(3) To ensure that the information gathering process does not result in a *de facto* obviation of the Commission's statutory obligations, or the deprivation of procedural and substantive due process rights of interested parties, the Commission and its representatives at meetings with the foreign administrations will expressly refrain from (a) discussing the merits of any matter which is the subject of a pending hearing, rulemaking, or other proceeding before the commission, or (b) advocating or advancing the interest of one American carrier or service at the expense of any other.

(4) The Commission shall provide public notice, at least 30 days in advance of any meeting or communication with representatives of foreign administrations or telecommunications entities, of the time and place of the proposed meeting and of the subject matter which the Commission proposes to discuss. In response to this notice, any interested party shall have the opportunity (a) to comment in writing on the propriety or wisdom of the Commission's intention to discuss the subject matter in question with the foreign administra-

tions; (b) to inform the Commission of its interest or position concerning that subject; (c) to propose additional subjects for discussion at the meeting; or (d) to make any other appropriate comment concerning the planned meeting. Prior to attending such meeting, the Commission shall issue another public notice which, in summary form, indicates its disposition of all comments received, including subjects added or deleted.

(5) Any meeting attended by representatives of foreign administrations or telecommunications entities will be public and open to all interested parties, unless the Commission expressly determines otherwise in the case of a particular meeting, by application of the criteria expressed in the Government in the Sunshine Act. In the event that any party is to be excluded from a meeting, the Commission will provide that party with a written statement of the reasons for its exclusion at least five days prior to the scheduled meeting date.

(6) All meetings with foreign administrations shall be held on the record, and the transcript or recording of the meeting shall be available to the public at the Commission offices.

(7) Any interested party will be afforded the opportunity to present its views, orally or in writing, to all meetings between foreign administrations and the Commission."

ITT Worldcom respectfully submits that the above regulations will create a suitable regulatory framework for any proposed meetings with representatives of foreign administrations or telecommunications entities, so as to ensure that such meetings can proceed in a manner consistent with the procedural and substantive rights of all interested parties. Such proposed rules are in no way intended to be comprehensive, but merely suggestive of problems which the Commission must confront if it intends to embark upon a course of contacts with foreign administrations and telecommunications entities.

CONCLUSION

For the reasons stated above, the Commission should revise its policy and procedures in the manner proposed herein.

Respectfully submitted,

ITT WORLD COMMUNICATIONS INC.

By. Howard A. White /s/

Susan I. Littman /s/

Its Attorneys

67 Broad Street

New York, New York 10004

Of Counsel

GRANT S. LEWIS

MARY JO EYSTER

LeBoeuf, Lamb, Leiby & MacRae

140 Broadway

New York, New York 10004

Dated: OCTOBER 24, 1979.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

File No. RM-3523

In the Matter of
ITT WORLD COMMUNICATIONS INC.

Petition for Rulemaking concerning
Contacts Between the F.C.C. and
Foreign Telecommunications
Administrations With Respect to
Future International Communication
Services and Entry of New Common
Carriers

REPLY COMMENTS OF
ITT WORLD COMMUNICATIONS INC.

ITT World Communications Inc. (ITT Worldcom) hereby submits its Reply Comments in response to comments filed by other parties participating in this proceeding.

In its Petition for Rulemaking herein, ITT Worldcom questioned the wisdom of private contacts between the Commission, through its Telephone and Telegraph Committee and Staff on one hand, and foreign administrations and telecommunications entities, on the other, for the discussion of new international services and carriers. It stated that if the Commission, nevertheless, intended to embark upon such a course, it must, at the outset, ensure that its participation proceed from clear cut legal and jurisdictional authority; it therefore asked the Commission to undertake a rulemaking, addressing first, the propriety of such an undertaking, and, second, a proper procedure to govern its participation so as to afford basic due process protection to all existing international service carriers which operate under Commission jurisdiction, and to all other parties interested in the effects of such Commission contacts.

This clarion call for observance of fundamental constitutional and statutory law has been met with "responsive" comments by four putative international service

carriers—GTE Telenet (GTE), Southern Pacific Communications Company (SPCC), Satellite Business Systems (SBS) and Graphnet, Inc. (Graphnet)—all of which vilify ITT Worldcom for its “presumptuousness” and urge the Commission to dismiss the Petition for Rulemaking and get on with its plans, regardless. Each argues that ITT Worldcom’s suggested rules are prompted by “protectionism” and must be put aside, for that reason alone. Striking a Macchiavellian pose, each states that since the Commission’s motives must be pure, its means may not be questioned. Indeed, the alarmist tone of the pleadings, each implying that for the Commission to abide by the Constitution and the law is tantamount to its failure to discharge its affirmative responsibilities, is itself alarming in its implications.

In its Reply, ITT Worldcom will discuss the primary underlying issue, the Commission’s lack of authority for the course upon which it is apparently embarking (Point I), and the particularly acute necessity for resort to traditional Constitutional protections for all parties which might be affected by the Commission’s contemplated actions (Point II).

I. THE COMMENTS FILED HEREIN UNDERSCORE A COMMON UNDERSTANDING THAT THE COMMISSION’S CONTEMPLATED CONTACTS INVOLVE INTERDICTED “NEGOTIATIONS”

Although the Comments noted above all decry ITT Worldcom’s attempt to thwart what is characterized as a mere exchange of information, and all pay lip-service to the concept that the Commission is forbidden to negotiate with foreign governments, it is clear that all parties discern an underlying attempt by the Commission “to seek the cooperation of foreign administrations in implementing [Commission] policy”;¹ to “influence the effectuation of policies which it has found to be in the public interest”;² “to accomplish its pro-consumer objectives;”³ “to present and discuss

¹ GTE Telenet Comments, p. 5.

² *Id.* at p. 7.

³ SPCC Opposition to Petition for Rulemaking, p. 2.

its policies with foreign telecommunications administrations,"⁴ and to engage in the "spontaneous flow of discussions that could lead to real understanding."⁵ The nature of the "real understanding" was set out by Chairman Ferris in a statement dated December 12, 1979, which accompanied the Commission news release announcing the Commission's order regarding a staff audit of the international carriers, where he stated:

"We are now engaged in a set of discussions with representatives of other countries which we hope will lead to greater cooperation in the introduction of new services and lower prices.

In conclusion I believe we have taken a significant step toward increasing competition in the international communications market. I am committed to examining other steps toward this goal. The carriers should be aware that the easy, and profitable, life inside the cartel is over."

What, indeed, are "negotiations," if not "discussions which [we hope] will lead to greater cooperation"? Certainly, the simple exchange of information cannot be expected to change the apparent policy of foreign governments. Were that true, the commission would have only to release to the foreign telecommunications entities any recent FCC decisions which define and explain Commission policy as regards these issues of "mutual concern."

In reality, however, the sitting Commission has never made findings on the necessity for foreign cooperation in assisting the entrance of new carriers or Commission involvement in securing their cooperation. Certainly no such findings exist in the *Graphnet*⁶ docket. Contrary to the mandate of Section 553 of the APA (5 U.S.C. Section 553), there has never been an opportunity afforded to affected carriers to comment upon any new public policy in that regard. Absent this vital authority, the Commission cannot

⁴ SBS Comments

⁵ *Graphnet* Comments, p. 9.

⁶ *Graphnet Systems, Inc.*, 63 F.C.C.2d 402 (1977), recon. denied, 67 F.C.C.2d 1020 (1978), affirmed *sub nom. ITT World Communications Inc. v. F.C.C.*, No. 77-4028 (2nd Cir. March 22, 1979).

engage in the exercise of advocating or securing such "cooperation" from foreign administrations, either on or off the record. To do so would be an abuse of the quasi-judicial functions entrusted to the Commission, and would render affected carriers powerless to seek redress. If, on the other hand, a decision to enter these discussions were made on the basis of a record proceeding, affected carriers, both present and putative, would have both an opportunity to comment and the right to appellate review.

The commenting carriers herein, believe as they might that Commission discussions with CEPT administrations would serve their economic interests, cannot sweep these fundamental issues under the rug with angry recriminations about ITT Worldcom's "desperation and presumptuousness" (*Graphnet*, p. 4) which would "stifle" (*Id.* at 9) "forestall," "preclude" and "hinder realization of a potentially beneficial alternative" (*SBS*, p. 3) with "cumbersome processes and procedures [which] might be established as conditions precedent to Commission interaction with representatives of foreign governments" (*Id.* at 6); or "severely constrict the ability of the Commission to influence the effectuation of policies which it has found to be in the public interest" (*GTE* at 7).⁷

Commenting parties have raised the issue of Commission involvement in facilities planning, stating that ITT Worldcom was not heard to complain about the legality of such meetings (see *GTE Comments*, p. 4).⁸ The Docket No. 18875 meetings are easily distinguishable from the instant contacts, first, because they represented part of docketed, on-going proceedings; second, because they were not held in secret, but (which one exception about which ITT

⁷ Several spurious issues have been injected into various comments in the proceeding, which will not be dealt with herein. Not at issue, for instance, are the wisdom of the *Graphnet* decision, the technological competence of ITT Worldcom and other existing international carriers, or the timeliness for a re-examination of international resale and shared use policy. At issue herein, however, are fundamental concepts whose urgency demands that they neither be postponed nor diluted with matters of the sort cited above.

⁸ See also, *SPCC Comments*, p. 3.

Worldcom did complain) at public sessions attended by interested and involved parties; and finally, because such meetings did not affect the equitable role of the Commission in dealing with its regulatees. It did not single out any one entity over others for foreign consideration, but dealt with all public-service carriers equally.

ITT Worldcom has taken no position upon the legality of direct Commission involvement in North Atlantic Planning or other Docket No. 18875 matters. It may be that the instant matters may raise a full panoply of issues with regard to the entire planning process. If a later reviewing court should find that even Commission action in those matters was *ultra vires*, the Commission in taking the bold steps at issue here, will have brought such outcome upon itself, and ITT Worldcom has no hesitancy in facing up to that possibility.

For the fact remains that the Commission, in taking off-the-record actions based on the personal views of the Committee members and necessarily presenting them as adopted Commission policy, could be laying the foundation for other impermissible activities in the name of public benefit. It would be hard to distinguish, for example, in light of the findings and conclusions in *French Telegraph & Cable* (Docket No. 19660) an effort to persuade Great Britain to sever ties with FTC, or to encourage the French not to interconnect with SBS (owned by IBM, Comsat and Aetna) or GTE Telenet, because the sheer size and market power of their parent corporations could tend to inhibit competition. Worst of all, the affected party would never learn what was contemplated or what was done, or be able to seek any redress.

Those parties to this proceeding who protest that policy and procedural safeguards will hinder or impede the Commission's endeavors made nominally on behalf of the American consumer, manifest little faith in the American system of law which requires that administrative agencies, like courts, be on-the-record arbiters, not off-the-record advocates.

II. THE COMMENTS SUBMITTED EMPHASIZE THE ACUTE NECESSITY FOR SAFEGUARDING THE FUNDAMENTAL DUE PROCESS RIGHTS OF ALL INTERESTED PARTIES

In its Petition for Rulemaking, ITT Worldcom suggested rules which will safeguard the basic due process rights of existing international service carriers. The rules are intended to ensure that all meetings be held with appropriate notice, in an open forum and on the record.

Commenting parties have suggested, however, that it is for the Commission to determine when the public interest would best be served by private meetings.⁹ GTE states (*Id.*): "The Commission should be entitled to exercise its discretion to tailor its procedures to the exigencies of the proceeding before it." On the contrary, the determination of what sort of proceedings must be open to the public is not a discretionary one, for an agency, but is dictated by the laws of Congress. Further, the Commission has, in its foreign contacts, no "proceeding before it." That is precisely the point.

SPCC has stated that, rather than resort, at the outset, to the traditional due process protections assured by the Constitution, "the FCC should be given wide latitude in the scope of its consultative discussions with foreign entities ..." until such time as any interested party "makes a showing that due process has been denied." (SPCC at 3-4). First, those who seek due process have no burden of proving that it has first been denied. Moreover, because the foreign meetings are not part of an existing docket, or based upon an existing record, in what forum shall aggrieved parties complain when it is already too late?

As regards suggested procedural safeguards, Graphnet contends:

"ITT's procedural proposed rules, of course, would preclude any informal exchanges of views or candid discussions of problems between the U.S. and other nations. For formal meetings, with rigid agendas, are

⁹ Comments of GTE, p. 8.

likely to stifle the spontaneous flow of discussion that could lead to real understanding. The requirements for a public transcript and submissions by interested parties could further encumber detailed and candid exchanges."¹⁰

SBS has candidly complained that, simply because ITT Worldcom's due process proposals "would contribute further toward preclusion of an SBS ability to furnish its services to overseas points other than by interconnection ..." (SBS Comments, p. 6) they must be ignored at any cost. It further believes that "cumbersome restrictions on Commission conduct in this vital area doubtless will lead to misunderstandings as well as possible misinformation."¹¹ (*Id.* at 7). It fails to state how any due process restrictions, cumbersome or not, can lead to greater misunderstandings than could be brought about by secret, off-the-record dialogues.

GTE argues that the Sunshine Act does not control because a quorum of Commissioners will not be present, and no "official agency business" is being transpired. (GTE at 6). This is patent nonsense. Although there are only three Commissioner representatives on the Telephone and Telegraph Committee, there can be no doubt that actions of lasting significance will be taking place. It is self-evident that in all such actions, the rights of carriers under Commission jurisdiction must be protected.

Graphnet's Comments, rife with anger and invective, protest (at p. 5) that "ITT seeks to assure that *it* will be the arbiter of what the Commission may say to overseas representatives and what it may not." (Emphasis in original). Going a step further, SPCC believes that an opportunity afforded interested carriers to comment upon proposed agenda "would be seriously fraught with antitrust ramifications." (SPCC at p. 8). This question was settled disposi-

¹⁰ Graphnet Comments, p. 9.

¹¹ See, also, GTE Comments, p. 8:

"The procedures urged by ITT would effectively prevent the Commission from developing an independent expertise and understanding of international issues, and would only promote international misunderstandings."

tively in *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 137-138, (1961) where the Court stated:

"In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."

See, similarly *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965), which approved the *Noerr* doctrine in matters involving petitions to administrative agencies and to courts.

ITT Worldcom does not seek to impose its will upon the Commission, but petitions the Commission, instead, to afford all interested parties the right to be heard, guaranteed by the Constitution and the Administrative Procedure Act.

Regarding the potential for prejudgment of pending proceedings, Graphnet makes the unsettling suggestion that such ills could be cured by timely notice of information upon which the Commission intends to rely, with a chance given the affected carriers to rebut or supplement the record. There would, however, be no record of such chance exchanges, but only Commissioners' informal recollections of what they think they heard that might have influenced their ultimate decision-making. No interested party could examine a transcript, subpoena a foreign representative for cross-examination, or otherwise rebut or supplement possibly prejudicial "information" to or from such sources. This

kind of "cure" for interdicted *ex parte* contacts, offers too little, too late.¹²

The Comments of the putative international carriers should be put aside, not simply because they indicate that SBS, SPCC, Graphnet and GTE seek to protect their own interests, but because the means they wish the Commission to utilize are forbidden by virtue of the Constitution and existing law.¹³

It is incumbent upon the Commission to explain, on the record, the legal basis and rationale upon which it intends to act, or engage in a proceeding to determine its proper legal objectives and procedures.

ITT Worldcom respectfully submits that the proposed rulemaking will provide a suitable framework for any forthcoming meetings of Commission and staff with representatives of foreign administrations or telecommunications entities, to ensure that all exchanges take place in a manner consistent with the procedural and substantive rights of all interested parties, including putative carriers.

¹² SPCC informs the Commission that, should Commissioners or staff members prejudge a pending proceeding, "this information may be elicited at a meeting with foreign entities." (p. 6). This disingenuous proposal apparently indicates that affected carriers must seek information from foreign governments which has been systematically denied them by their own government. Furthermore, SPCC cavalierly advances the suggestion that any Commissioner who has stated anything indicative of prejudgment could be recused from further proceedings in relevant matters. (p. 7). The mere necessity for recusal would of itself render committee contacts with foreign administrations useless. See ITT Worldcom, Petition for Rulemaking, pp. 8-13, and fn. 5 therein.

¹³ There do exist several forums in which the Commission could legitimately participate, including, for instance, various CCITT study groups, attended by interested delegations worldwide, and by interested carriers. ITT Worldcom does not seek to silence the Commission, but only to subject it to the law and Constitution it is sworn to uphold.

CONCLUSION

For the reasons stated above, as well as in the Petition for Rulemaking, the Commission should revise its policy and procedures in the manner proposed.

Respectfully submitted,

ITT WORLD COMMUNICATIONS INC.

/s/

HOWARD A. WHITE

SUSAN I. LITTMAN

Its Attorneys

67 Broad Street

New York, New York 10004

Of Counsel:

Grant Lewis

Mary Jo Eyster

LeBoeuf, Lamb, Leiby & MacRae

140 Broadway

New York, New York 10005

Dated: January 8, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS

CERTIFIED LIST OF ITEMS IN THE RECORD

1. Petition for Rulemaking filed by ITT World Communications, Inc. on October 24, 1979.
2. Opposition to Petition for Rulemaking filed by Southern Pacific Communications Company dated December 19, 1979.
3. Comments of Graphnet, Inc. filed on December 19, 1979.
4. Comments of GTE Telenet Communications Corporation filed on December 19, 1979.
5. Comments filed by Satellite Business Systems on December 19, 1979.
6. Comments of RCA Global Communications, Inc. filed on December 19, 1979.
7. Reply Comments of Western Union International, Inc. filed on January 3, 1980.
8. Reply Comments of ITT World Communications, Inc. on January 8, 1980.
9. Reply of RCA Global Communications, Inc. filed on January 8, 1980.
10. Reply to RCA Global Communications, Inc. filed by Graphnet Inc. on January 8, 1980.
11. Memorandum Opinion and Order Denying Petition adopted on April 28, 1980 and released on May 2, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS.

CERTIFICATE OF WILLIAM J. TRICARICO,
SECRETARY.

FEDERAL COMMUNICATIONS COMMISSION

I, William J. Tricarico, Secretary, Federal Communica-
tions Commission, do hereby certify that the preceeding is
a true and correct list of the items comprising a record in
the proceedings before the Federal Communications Com-
mission considered pertinent to the above entitled case.

Witness my hand and Seal of the Federal Communica-
tions Commission this 11th day of August, 1980.

FEDERAL COMMUNICATIONS COMMISSION

/s/

WILLIAM J. TRICARICO

Secretary

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC.,
67 BROAD STREET, NEW YORK, NEW YORK
10004 (212) 797-3300 PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

[Filed February 12, 1980]

COMPLAINT

ITT World Communications Inc. ("ITT Worldcom"), by its attorneys, LeBoeuf, Lamb, Leiby & MacRae, alleges as follows for its complaint:

JURISDICTION

1. This is an action for declaratory and injunctive relief. The action arises under the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; the Freedom of Information Act, 5 U.S.C. § 552; the Government in the Sunshine Act, 5 U.S.C. § 552b; and the Constitution of the United States.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B), and 552b(h)(i) and under 28 U.S.C. §§ 1331, 1337 and 2201.

PARTIES

3. Plaintiff ITT Worldcom is a corporation organized under the laws of the State of Delaware. Its principal place of business is located at 67 Broad Street, New York, New York.

4. Defendant Federal Communications Commission ("FCC" or "Commission") is an agency of the United States, established by the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.* Its principal office is located within the District of Columbia.

FIRST CLAIM FOR RELIEF
FCC NEGOTIATIONS AND CLOSED MEETINGS
WITH FOREIGN GOVERNMENTS

5. ITT Worldcom is one of several American companies that provides international record (that is, non-voice) communication services. It is subject to the regulatory jurisdiction of the FCC.

6. In January 1977, the FCC granted applications filed by two companies which had not previously provided international service (the "new carriers"), for certificates under Section 214 of the Communications Act, 47 U.S.C. § 214, to render certain specialized international record communications services between the United States and Europe in competition with ITT Worldcom and other American carriers.

7. In addition to requiring a certificate from the FCC, in order to render international record communication services, an American company must make appropriate operating arrangements with the foreign communications agency or entity with which it wishes to interconnect, that is, which is to provide the other end of the international service. At the time the new carriers received their Section 214 authorizations, they had made no such arrangements. While carriers have almost always entered such agreements prior to seeking authorization from the FCC, the FCC did not require the new carriers to do so, explaining that "we have indicated that the terms and conditions of service specified in these agreements is an important element in our consideration as to whether the services are for the overall public interest. We believe, in this case, our regulatory judgment concerning this element can be as effectively applied prior to initiation of service as prior to authorization." 67 F.C.C.2d at 1040.

8. To date, no European telecommunications entity has seen fit to enter into an operating agreement with the new carriers.

9. In most European countries, telecommunications service is rendered by governmental entities, and not private companies. The unwillingness of these European govern-

ments to enter into agreements with the new carriers has troubled certain members of the FCC. At the time of the FCC decision in October 1978 authorizing a new transatlantic cable ("TAT") which the European governments had supported, FCC Commissioner Fogarty issued a separate statement in which he sought a "tit for TAT." The "tit" was "recognition of our competitive policies and . . . agreements to deal with our multiplicity of carriers." He stated:

"Coupled with the need for circuit planning is the necessity for the foreign correspondents to recognize our competitive policies. Many other foreign correspondents have balked at dealing with more than a small number of United States carriers. The specialized carriers which we have authorized to offer international services have met with almost universal opposition when seeking operating arrangements abroad. Now that the Commission has considered and, to some degree, deferred to the policies and expressed needs of the foreign governments, we should expect "tit for TAT" from the Europeans in terms of their recognition of our competitive policies and their agreement to deal with our multiplicity of carriers. Without such reciprocity, I cannot see how we can give any weight or consideration to the Europeans' internal needs and policies in our future dealings. In the final analysis, reciprocity must be a two-way street, a dialogue rather than a monologue." 71 F.C.C.2d at 99.

10. For several years, representatives of the FCC, through its Telephone and Telegraph Committee and staff, have met with the Canadian (Teleglobe) and European telecommunication administrations and carriers ("CEPT") to discuss "facility planning" (*e.g.*, the laying of a new cable to serve anticipated future needs). These meetings have generally been open meetings to which all interested parties, including ITT Worldcom and the other American international record carriers, have been invited to attend. Recognizing that negotiating with foreign governments is the province of the Department of State (and proscribed to others by the Logan Act, 18 U.S.C. § 953, unless specifically authorized), the FCC has conceded that "the FCC cannot, and should not, negotiate final facilities agreements."

11. It is believed that the FCC, while purporting to recognize that it must avoid negotiations concerning facilities, has in fact used the facility planning meetings to negotiate with foreign governments on behalf of the new carriers. In a telex dated March 20, 1979, the FCC's general counsel virtually conceded that negotiating was occurring at the meetings when he explained that the purpose of these meetings was to "narrow differences and to move towards a consensus." He later went on to explain that "we are concerned about the difficulties involved in reaching agreement on the implementation of new overseas service arrangements. The consultative process may provide a mechanism of increasing cooperation in this area."

12. At a March 22, 1979 meeting in Montreal, to which representatives of the public were invited and a transcript of which was made, Commissioner Fogarty again urged the foreign entities to agree to deal with the "specialized carriers which the Commission has authorized," this time stating that he was speaking for the entire Commission:

"Now, many foreign correspondents, as I understand, have balked already at dealing with more than a small number of United States carriers.

"The specialized carriers which the Commission has authorized already to offer international services have met, as I understand it, with almost universal opposition, from our foreign correspondents, when seeking operating arrangements and agreements abroad.

"Now, I believe that the Commission, as I said, has already gone a long way toward meeting the requirements, needs, and necessities, as our foreign correspondents see it.

"And I would hope, that as we have deferred, in our recent decision, to your needs, as you see them, that you would give us the "tit" for the "tat;" in other words, if you would recognize our competitive policies, and that your agreements would deal with our requirement for multiplicity of carriers in this competitive arena.

"I think the Commission—I can speak for myself and, I'm sure, for the Chairman, and for Mr. Lee, and for the other commissioners who are not present—we want to meet you half way, but we do request, I think,

that the *quid pro quo* would be that you recognize that we are trying to promote competition in the United States, and that competition spreads abroad, and that you would meet our specialized common carriers, and that you would agree to deal directly with them."

13. Between the time of the Montreal meeting in March 1979 and October 1979, no foreign government entered into an operating agreement with either of the new carriers. At the next international meeting in Dublin, Ireland, in October 1979, the discussion of new carriers was moved behind closed doors at a scheduled, but off-the-record (*i.e.*, no transcripts) session. ITT Worldcom and all other American carriers were excluded from this meeting, although privately-owned foreign carriers were permitted to attend. While ITT Worldcom is unaware of what transpired at that meeting, it believes that the principal purpose of the meeting was to persuade the foreign administrations to enter into operating agreements with the new carriers.

14. On October 31, 1979, Chairman Ferris telexed all interested overseas administrations and requested a further meeting. While again explaining that "we are not seeking to negotiate the resolution of differences," he went on to express his concern that "neither of the two new carriers have been able to reach operating agreements with correspondents in the CEPTs."

15. On February 1, 1980, the FCC announced that a further meeting of the representatives of the European and Canadian telecommunications entities would be held in England on February 20-21 (the "England meeting"). The purpose of the England meeting was stated to be "to informally consult on international communications topics of mutual interest. It is expected that the meeting will produce an exchange of views regarding the opportunities for increasing the range and availability of telecommunications services."

16. At a meeting on February 8, an FCC spokesman stated that the purpose of the England meeting would be to review with the CEPT nations recent FCC decisions concerning international service pursuant to which the Commission has authorized additional companies to provide internation-

al record services (although it was not indicated what would be stated that is not in the decisions themselves).

17. The real purpose of the England meeting was recognized by Commissioner Fogarty at the open FCC meeting on January 30: "We are going to London in a couple of weeks to discuss with the European entities the question of allowing the value added carriers and specialized carriers to do business." He went on to explain, when urging that one of the new carrier's Section 214 authorization be extended, that if it were not, "it might be a signal to the European entities that we don't really mean business."

18. So too, the real purpose of the England meeting was recognized by an additional company which is presently requesting FCC authorization to provide international record communications. On February 4, 1980, its counsel wrote to Chairman Ferris of the FCC, indicating that it has been following "with keen interest the Commission's efforts to contact foreign administrations to explain U.S. policy", that it understands that "the time may be right for such discussions to impress upon foreign governments the important public benefits that may be derived from open entry" and concluding "with every good wish for success. . ."

19. The England meeting is to be another closed and off-the-record meeting, from which ITT Worldcom and other American carriers are to be excluded. ITT Worldcom believes that the FCC representatives will seek to persuade the other attendees to enter into operating agreements with the new carriers.

20. The Commission and its staff plan to participate in future, off-the-record, international meetings from which ITT Worldcom and other American carriers will be excluded and at which the FCC will be negotiating with foreign governments to benefit certain American carriers. At these meetings, representatives of the FCC will be formulating and articulating American policies, which will directly affect ITT Worldcom and other carriers, although the FCC has complied with none of the constitutional and statutory requirements which must precede its so doing. It is anticipated that European entities will take action based on statements made by the FCC representatives although ITT

Worldcom and other interested parties will receive no adequate prior notice of what the Commission is advocating or any reasonable opportunity to comment thereon.

21. The Commission, acting through citizens of the United States without authority of the Department of State, has commenced and is carrying on correspondence and intercourse with foreign governments with the intent of influencing the measures and conduct of those foreign governments in relation to an existing dispute and controversy with the United States.

22. The activities of the FCC described above are unlawful and *ultra vires*, and in excess of the authority conferred on the FCC by the Communications Act, *supra*.

23. On October 29, 1979, ITT Worldcom filed a Petition for Rulemaking with the FCC in which it questioned the Commission's authority to engage in the negotiations and discussions with foreign governments and urged that if they were to go forward, the Commission should adopt rules of policy which delineate clearly the purpose of the meetings and the authority and obligations of the FCC representatives who participate in them, and rules of procedure which will guarantee due process to carriers and other parties who are likely to be affected by the meetings. The FCC has failed to take the requested action.

24. On January 31, 1980, ITT Worldcom, in a letter to Charles D. Ferris, Chairman of the FCC, requested that the FCC direct the Committee and staff to refrain from participation in the proposed February meeting and in any other future private meetings involving representatives of foreign administrations and carriers; or that the Commission postpone any planned secret meetings until the issues raised in ITT Worldcom's Petition for Rulemaking respecting the FCC's authority and its obligations under the Administrative Procedure Act ("APA"), are resolved legally. The Commission has refused to take the requested action and, as indicated in paragraph 15, announced on February 1 that a meeting would be held in England on February 20-21.

25. Plaintiff has exhausted all available administrative remedies. It is entitled to equitable relief since it has no adequate remedy at law.

SECOND CLAIM FOR RELIEF

Freedom Of Information Act

26. On October 12, 1979, ITT Worldcom filed a Freedom of Information Act ("FOIA") request with the FCC, seeking, among other things, certain documents relating to the closed Dublin meeting referred to in paragraph 13, and communications involving FCC representatives concerning operating agreements between the new carriers and foreign correspondents.

27. In a letter dated November 16, 1979, the Chief of the Common Carrier Bureau, Philip L. Verveer, responded to ITT Worldcom's request, providing certain of the relevant documents but withholding many others, alleging that the materials withheld were exempt from disclosure.

28. ITT Worldcom filed an Application For Review with the FCC on December 17, 1979 to appeal the denial of the request.

29. Although the FCC's time to make a determination on the appeal has expired, the FCC has not done so.

30. Under the Freedom of Information Act, ITT Worldcom has the right of access to the requested material. Defendant has no legal basis for its action in withholding access to such materials.

31. Plaintiff has exhausted its administrative remedies as provided in the Freedom of Information Act and the FCC regulations.

THIRD CLAIM FOR RELIEF

Government In The Sunshine Act

32. Plaintiff repeats and realleges each of the allegations contained in paragraphs 5 through 25 as if set forth fully herein.

33. The Commission is an agency of the United States, and the Commission's Telephone and Telegraph Committee is a subdivision of that agency authorized to act on its behalf, within the meaning of the Government in the Sunshine

Act, 5 U.S.C. § 552b(a)(1) (the "Sunshine Act"). FCC representatives will attend a scheduled meeting on February 20-21, which will be open to representatives of foreign administrations and foreign carriers but will be closed to U.S. carriers, and similar meetings are planned for in the future.

34. The FCC has authorized its representatives to act on behalf of the Commission, and the representatives' deliberations may determine or result in the disposition of official agency business within the meaning of the Sunshine Act, 5 U.S.C. § 522b(a)(2), and the FCC's regulations, 47 C.F.R. § 0.601(a) and (b).

35. The FCC representatives intend to make statements and representations regarding U.S. policy, make concessions and commitments to engage support, and otherwise act on behalf of the FCC.

36. The FCC has disregarded the requirements of the Sunshine Act, 5 U.S.C. § 522b and its own regulations governing the conduct of meetings, 47 C.F.R. §§ 0.601-0.607, in participating in a meeting which is closed to public observation, in failing to maintain a complete transcript of the meeting, in failing to provide adequate notice of the meeting, in failing to announce the reasons for holding a closed meeting, and in failing to take other actions required by the Sunshine Act and the FCC regulations.

37. Plaintiff has been injured and will be further injured by the Commission's actions in conducting FCC business in closed meetings in violation of the Sunshine Act.

38. Plaintiff has exhausted its administrative remedies.

WHEREFORE, plaintiff respectfully prays for judgment:

(1) Declaring that the Commission may not lawfully participate in the proposed meetings;

(2) Enjoining the Commission from engaging in any meetings or communications of the sort described in the Complaint;

(3) Declaring that the Commission may not advocate the interests of individual private carriers;

(4) Enjoining the Commission from negotiating with foreign governments;

(5) Declaring that the Commission has violated the Administrative Procedure Act and enjoining further violations thereof;

(6) Ordering that the Commission provide plaintiff access to the material requested pursuant to the FOIA;

(7) Directing the Commission to comply with the provisions of the Sunshine Act;

(8) Awarding plaintiff reasonable attorney fees and the other litigation costs that it has reasonably incurred;

(9) Granting such other and further relief as the Court may deem just and proper.

DATED: Washington, D.C. February 12, 1980

LEBOEUF, LAMB, LEIBY & MACRAE

/s/

EUGENE R. FIDELL
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

/s/

GRANT S. LEWIS
140 Broadway
New York, New York 10005
(212) 269-1100

Attorneys for Plaintiff
ITT World Communications Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

ANSWER

First Defense

Plaintiff has failed to state a claim for which relief can be granted.

Second Defense

Plaintiff has failed to exhaust its administrative remedies.

Third Defense

This Court lacks jurisdiction over the subject matter of plaintiff's first claim for relief.

Fourth Defense

Defendant, the Federal Communications Commission, by its undersigned attorneys, hereby answers the numbered paragraphs of the complaint as follows:

1. This paragraph contains plaintiff's characterizations of the action and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

2. This paragraph contains plaintiff's jurisdictional allegations and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

3. Defendant admits the allegations of this paragraph.

4. Defendant admits the allegations of this paragraph.

5. Defendant admits the allegations of this paragraph.

6. Defendant admits the allegations of this paragraph.

7. Defendant admits the allegations of the first and second sentences of this paragraph. Defendant denies the re-

maining allegations of this paragraph except to admit the existence of a Federal Communications Commission decision which appears at 67 F.C.C. 2d 1020, to which the Court is referred for a complete statement of its contents.

8. Defendant lacks sufficient information or knowledge upon which to form an opinion as to the truth of the allegations of this paragraph.

9. Defendant answers the first sentence of this paragraph by averring, upon information and belief, that in some European countries, telecommunications service is rendered by governmental entities. Defendant denies the remainder of this paragraph except to admit the existence of Commissioner Fogarty's statement which appears at 71 F.C.C. 2d 97, to which the Court is referred for a complete and accurate statement of its contents.

10. Defendant admits that meetings of the type described in paragraph 10 have occurred, but denies that its participation in these meetings has violated any constitutional or statutory provisions. The quotation in this paragraph is unattributed, and the Commission is therefore without knowledge to admit or deny it. Defendant further states that its Telephone and Telegraph Committee is now called the Telecommunications Committee.

11. Defendant denies the allegations of this paragraph except to admit the existence of a telex dated March 20, 1979, a copy of which is attached as Exhibit A, to which the Court is referred for a full and complete statement of its contents.

12. Defendant denies the allegations of this paragraph except to admit that the language quoted appears in the transcript of the referenced meeting, a copy of the relevant portion of which is attached as Exhibit B, to which the Court is referred for a full and complete statement of its contents.

13. Defendant lacks sufficient information or knowledge upon which to form an opinion as to the truth of the allegations of the first sentence of this paragraph. Defendant denies the remainder of the allegations of this paragraph except to admit that a conference was held in Dublin, Ireland in October 1979.

14. Defendant denies the allegations of this paragraph except to admit that Chairman Ferris sent a telex to overseas administrations on October 31, 1979, a copy of which is attached as Exhibit C, to which the Court is referred for a full and complete statement of its contents.

15. Defendant lacks sufficient information or knowledge with which to identify the FCC "announcement" alleged in this paragraph and is therefore unable to form an opinion as to the truth of the other allegations of this paragraph.

16. Defendant lacks sufficient information or knowledge with which to identify the FCC "spokesman" referenced in this paragraph and is therefore unable to form an opinion as to the truth of the other allegations of this paragraph.

17. Defendant answers this paragraph by admitting that Commissioner Fogarty made the quoted statements, but defendant denies the remainder of the allegations of this paragraph.

18. Defendant lacks sufficient information or knowledge with which to identify the author of the letter alleged in this paragraph and is therefore unable to form an opinion as to the truth of the other allegations of this paragraph.

19. Defendant denies the allegations of this paragraph.

20. Defendant denies the allegations of this paragraph.

21. Defendant denies the allegations of this paragraph.

22. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

23. Defendant answers this paragraph by averring that plaintiff has filed a petition for rulemaking and that the petition is still pending before the Commission and scheduled for consideration by the Commission on April 22, 1980. Defendant denies the remainder of the paragraph.

24. Defendant admits the first sentence of this paragraph. Defendant answers the second sentence of this paragraph by stating that a conference was held on February 20-21 in England and that three members of the Commission and several Commission staff members were in attendance. Defendant denies all other allegations of this paragraph.

25. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, defendant denies that plaintiff has exhausted its administrative remedies and denies all other allegations of this paragraph.

26. Defendant admits the allegations of this paragraph except to deny the characterization of Dublin conference.

27. Defendant admits the allegations of this paragraph.

28. Defendant admits the allegations of this paragraph.

29. Defendant answers the allegations of this paragraph by averring that it ruled on plaintiff's application on February 20, 1980, and released some additional documents, and properly withheld the remainder.

30. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

31. Defendant admits the allegations of this paragraph.

32. Defendant repeats here each of the answers to paragraphs 5 through 25 and incorporates and adopts the answers by reference.

33. Defendant denies the allegations of this paragraph except to admit that it is an agency of the United States, and that the Telecommunications Committee is one of its subdivisions. Defendant further states that the February 20-21 conference has already been held and that FCC representatives did attend it.

34. Defendant denies the allegations of this paragraph.

35. Defendant denies the allegations of this paragraph.

36. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

37. Defendant denies the allegations of this paragraph.

38. This paragraph contains a conclusion of law and not an averment of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

Defendant denies that plaintiff is entitled to the relief requested or to any relief whatsoever.

Any allegations not hereinbefore specifically answered are denied.

WHEREFORE, defendant requests that this action be dismissed with prejudice and that defendant be granted its costs.

- OF COUNSEL:

ROBERT R. BRUCE
General Counsel

KEITH H. FAGAN
*Acting Assistant General
Counsel*

JOHN P. GREENSPAN
Counsel

Federal Communications
Commission
Washington, D.C. 20554

ALICE DANIEL
Assistant Attorney General
Civil Division

CHARLES F. C. RUFF
United States Attorney

/s/ _____
VINCENT M. GARVEY

/s/ _____
SURELL BRADY
Attorneys, Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-5302

[Exhibit A]

[Telex dated March 20, 1979, from FCC General Counsel Robert R. Bruce to Mr. R. Seguin, Vice-President, Teleglobe, Montreal, Canada]

This is in response to your very constructive March 1, 1979, discussion paper on the North Atlantic facilities planning process. I would like to provide you with my personal views, after detailed discussions with Larry Darby, the Chief, Common Carrier Bureau, on your informal paper and on the future of the consultative process.

This exchange of views was initiated at the Reston meeting and was intended to establish a basis for fuller discussions among the principals. There are, of course, many areas in which much more detailed discussion and careful reflection will be required; but, we found your paper a very lucid and practical beginning for future planning efforts, and an excellent starting point for discussion at the Montreal meeting.

We found the general structure of your paper quite helpful and usefully pragmatic. You have provided a summary of perceptions of the difficulties experienced in the past and suggested some options to deal with these perceived problems. We believe that the success of the consultative process in the future must build on a recognition of both the shortcomings and successes of the processes initiated several years ago.

We have become acutely aware of the difficulties with the process as it has functioned in the past, and you have mentioned many of these difficulties in your paper. We would hope that future discussions could help to identify the precise nature of these difficulties as a prelude for the fashioning of remedies. Such a process could be an integral part of a multidimensional effort to develop improved mechanisms for planning and minimizing the risk of delays, misunderstandings, and other problems which have characterized past planning efforts.

Your paper is rich in detail and unfortunately we have not had the opportunity to accord it the attention it properly deserves. Nevertheless, we would like to share some general, and preliminary observations, which are in large

part provoked by your paper and our informal discussions over the past few months.

1) We believe that it is important to stress that the process will not necessarily have failed if there is no agreement on specific methodologies, planning principles, or even plans. A very significant achievement would be to identify the different approaches being used by the different parties, to narrow differences, and to move toward consensus. It would be useful to identify and understand areas of disagreement as well as to reach agreement on common principles and approaches. The prospects for reducing major conflicts over facilities planning issues may depend significantly on each party's understanding of the detailed rationale and basis for the positions advocated by the others. It seems to us particularly important to understand better where national interests, institutional arrangements, or planning principles cannot be accommodated or compromised in the interest of reaching agreement.

2) We do not believe that the emphasis should necessarily be placed on the establishment of a highly structured planning process with a firmly set charter or the achievement in the consultative process itself of a formally agreed upon plan. These do not seem to be realistic goals from either a U.S. domestic or an international perspective. As has often been observed, the FCC cannot, and should not, negotiate final facilities arrangements. It must remain under U.S. law unhindered to make its best determination about an overall facilities plan; and it cannot be in a position of prejudging or seeming to prejudge any final determinations by reaching prior agreements in an international forum. In our view this limitation, however, does not preclude the FCC from taking fully into account the different methods, plans, and priorities of other telecommunications entities. We see the consultative process as a useful means of obtaining more complete information about the plans and priorities of our foreign telecommunications partners without subjecting sovereign activities to United States regulatory jurisdiction in fact or in appearance. In addition to these domestic considerations, it appears to us that any re-

gional agreement must be sufficiently flexible to be incorporated into global facilities plans.

3) Consultations can be very useful in the initial phases of U.S. procedures as well as after the Commission has developed or reviewed a plan pursuant to its procedures—if international agreement on a plan has not been achieved. North Atlantic telecommunications facilities and services cannot be provided without the concurrence of Canadian, European, and U.S. interests; and mutually acceptable plans and arrangements must be evolved. The FCC is certainly able to participate, as it has in the past, in meetings to explore differences with respect to the facility plans developed under U.S. and foreign procedures. These differences can be taken into account by the Commission as it seeks to identify a mutually acceptable plan which is consistent with the Commission's legal obligations under the Communications Act. Thus, in addition to the alternative of formal intergovernmental negotiations—a further “iterative process” is an available option under present U.S. procedures.

4) We believe that it is important to proceed with a new planning effort before a final determination is made about any facility for the post-1985 planning period. It appears that past efforts to plan effectively may have been hindered because the planning process for the entire period became intertwined with consideration of the construction of a specific cable facility while proposed satellite facilities were not simultaneously considered.

5) In this context, we were impressed by your observation that participants “ran out of time” in the last planning period. We share your sense of urgency about moving ahead in the consultative process. It is almost essential to identify specific facilities decisions and steps necessary to coordinate related decisions at the earliest possible time so that all participants may be able to prepare more effectively. While we are not now in a position to embrace the specific timetables proposed in your paper, we agree that the development of such a timetable is critical. We believe that an expert working group might be able to identify an appropriate calendar of future decisions. Furthermore, while

much of the consultation should be about the period 1985-1990, we believe, as you apparently do, that the planning horizon should be extended to the extent feasible beyond a five year incremental period.

6) We also agree with you that in the early stages of a planning process participants can, and should, focus on the basic "building blocks" of decisions: methodologies, data bases, and planning principles. These are useful to all sides and in all arenas. In addition, we expect that there may well be significant changes in the technology of transmission systems which might have an important bearing on facilities decisions made in the near future. Thus, technology assessment and evaluation may be another area of useful interchange in the early stages of the consultative process.

7) We recognize that there has been concern about seemingly unilateral decisionmaking by the United States in the area of facilities planning. An effective consultative process should ameliorate this concern. On the other hand, we are concerned about the difficulties involved in reaching agreement on the implementation of new overseas service arrangements. The consultative process may provide a mechanism for increasing cooperation in this area.

8) We envision an increasing convergence of domestic and international policy considerations, and we believe that a consultative process can provide a direct and candid means of exchanging views on many regulatory and policy issues of mutual concern—domestic and international. Thus, we believe that the Montreal and subsequent meetings should begin to develop an agenda of these important new issues which reach beyond present concerns about facilities planning.

9) We believe that the exact nature of the consultative process and its integration into the domestic procedures in the U.S. and elsewhere will require further detailed study. It does not appear to be possible to resolve these important issues at Montreal. We hope that they will be pursued with some sense of urgency in the coming months.

10) These comments are, of course, by no means comprehensive and reflect only our initial personal views on this

important subject. We are looking forward to seeing you again in Montreal and further addressing these important policy issues.

ROBERT R. BRUCE
GENERAL COUNSEL
FEDERAL COMMUNICATIONS
COMMISSION

[Exhibit B]

[Excerpts from transcript of meeting, March 22, 1979, in Montreal, Canada]

* * *

By Mr. Delorme: Merci! Commissaire Fogarty, vous avez la parole!

By Mr. Fogarty:

Thank you, Mr. Chairman. Thank you, Mr. Chairman! If I may add to the comments already on the record, from our Chairman, and from my distinguished colleague, Mr. Lee, I'd like to suggest that after listening to the debate and discussion here today, that I think it's essential that our friends from Teleglobe, and the European counterparts, recognize that in the adoption of the memorandum "Opinion and Order", of March sixteen (16), the commission has gone a long way in an attempt to implement Comity.

I'd like to suggest also, Mr. Chairman, that I might disagree, in some degree, with your comment that it may be premature, at this time, to consider new and novel services.

In my attempt to digest the material that has been presented before the commission, with respect to this issue, I have found it paramount to make a determination that Tat seven (7) really is in the American public interest, and I remain convinced today ... unconvinced today that we really need the cable to service the public interest.

However, more must be considered ... more must be considered, and that's what Comity comes into play.

And I'd like to suggest that, as part of these future discussions, we must not only determine a common methodology for estimating circuit needs, and I note that representative of A.T. and T., Mr. Nichols, suggests that by nineteen eighty-four (1984) there will be a need for ten thousand (10,000) additional circuits.

I would like ... I would like to suggest that our working group consider planning and estimating circuit needs for this planning period, and then, thereafter, decide to negotiate the need for facilities to meet these requirements.

Now, coupled with the need for circuit planning, in my view, is the necessity for our friends, our foreign correspondants, to recognize the competitive policies that have already been adopted by the Federal Communications Commission.

Now, many foreign correspondants, as I understand, have balked already at dealing with more than a small number of United States carriers.

The specialized carriers which the commission has authorized already to offer international services has met, as I understand it, with almost universal opposition, from our foreign correspondants, when seeking operating arrangements and agreements abroad.

Now, I believe that the commission, as I said, has already gone a long way toward meeting the requirements, needs, and necessities, as our foreign correspondants see it.

And I would hope, that as we have deferred, in our recent decision, to your needs, as you see them, that you would give us the "tit" for the "tat"; in other words, if you would recognize our competitive policies, and that your agreements would deal with our requirement for multiplicity of carriers in this competitive arena.

I think the commission—I can speak for myself and, I'm sure, for the Chairman, and for Mr. Lee, and for the other commissioners who are not present—we want to meet you half way, but we do request, I think, that the quid pro quo would be that you recognize that we are trying to promote competition in the United States, and that competition spreads abroad, and that you would meet our specialized common carriers, and that you would agree to deal directly with them.

* * *

[Exhibit C]

[Telex dated October 31, 1979, from
FCC Chairman Charles D. Ferris
to overseas telecommunications administrations]

02 Washington DC 31 Oct 79 2320GMT
Mr. Thorsten Larsson Chairman OEPT/CLTA
Central Administration of
Swedish Telecommunications
S-123 86 Farsta Sweden

Copies To:

Mr. F Zimmermann
General Postdirektion
Postgasse 8
A-1011 Wien Austria

Mr. A. Theys
Regie Des Telegraphes Et Des
Telephones
Administration Generale
2E Bureau
42, Rue Des Palais
B-1030 Bruxelles Belgium

Mr. H Pedersen
Generaldirektoratet For Telegrafvaesenet
Anker Heegaards Gade 4
DK 1007 Koebenhavn K Denmark

Mr. R. Alander
Post-OCH Telegrafstyrelsen
Box 528
SF-00101 Helsinki 10 Finland

Mr. J. Grenier
Direction Generale Des
Telecommunications
Direction Des Affaires Industrielles
Et Internationales
20, Avenue De Segur
F-75700 Paris France

Mr. H. Wirz
Ministerium Fur Das Post

Und Fernmeldewesen
Adenauerallee 81
D-53 Bonn Fed Rep Of Germany

Mr. S. O'Droma
Dept Posts and Telegraphs
Marlborough Street
Dublin Ireland

Mr. E. Brizzi
ITALCABLE
Via Calabria 46-48
I-001 Roma Italy

Mr. C Marcolin
Telespazio Sia Per Le
Communicationi Spaziali
Corso D'Italia, 43
I-00198 Roma Italy

Mr. Kisch
PTT Headquarters
Avenue Monterey E A
Luxembourg Luxembourg

Mr. B. Bakker
Direction General Des Postes, Des
Telegraphes Et Des Telephones
Dept Des Affaires Internationales
12, Kortenaerkade
The Hague Netherlands

Mr. P. Rabbas
Teledirektoratet
Postboks 6701
St Olavs Plass
Oslo 1 Norway

Mr. J. Saraiva-Mendes
Companhia Portuguesa Radio Marconi
Praca Marques De Pombal 15
Lisboa 2 Portugal

Mr. L. Terol
Compania Telefonica Nacional
De Espana

Plaza De Esfana, 3
Madrid-13 Spain

Mr. G. Baggenstos
Direction Generale Des PTT
Viktoriastrasse 21
CH-3000 Berne 14 Switzerland

Mr. W. Danke
Radio Suisse S A
Schwarztorstrasse 61
CH-3000 Berne 14 Switzerland

Mr. J. Hodgson
External Telecommunications
Executive
Alder House
1 Aldersgate Street
London ED1A 1AL United Kingdom

Dear Chairman Larsson:

As we agreed at our informal meeting in Dublin on October 3, I am sending you this Telex, with copies to your CEPT colleagues and a similar telex to Teleglob Canada, to further define our proposal to broaden the range of subjects on which we consult. I believe there may well be some topics which you and your colleagues think would be useful subjects for informal consultations.

The existing consultations process has provided an opportunity for the participants to exchange views on our respective policies with respect to international telecommunications facilities. It is my hope that through such discussions we can better understand the basis for our respective decisions. I believe that a like mechanism is needed in other areas of mutual interest to the United States, CEPT, and Canada.

I would welcome your views on topics for discussion. At this point I believe there is a need for an exchange of views on questions pertaining to new and existing services between the various CEPT nations and the United States and the introduction of new carriers between the U.S. and the CEPT nations.

There is in the United States a growing appreciation that competition in telecommunications has produced benefits for consumers of telecommunications services. We have observed domestically both the introduction of new services and significant improvements in the provision of existing services. In the process, a significant number of applications have been filed by new carriers seeking to provide services within the U.S.

Recent applications have required the Commission to consider similar issues in the international arena. In 1977, the Commission found that the U.S. users of international telecommunications would benefit from new data services between the United States and certain CEPT countries. These services were to be provided by existing U.S. international carriers and by two new U.S. international carriers. However, neither of the two new carriers have been able to reach operating agreements with correspondents in the CEPT countries to which the Commission authorized them to provide service. Consequently, the benefits to the public which the Commission found would result from the operation of these new carriers have not been realized.

I understand that there may well be differences between the policies of the CEPT nations and those that are developing in this country. The ongoing consultative process has been a useful means for exchanging views on North Atlantic facilities policies, and I believe that consultation on these other subjects can yield similar benefits.

With regard to the structure for such discussions, I would suggest that the exchange of views on topics other than international facilities planning should take place in a process separate from the existing consultative process. I also believe that while a defined structure for this exchange is desirable, the procedure adopted should be as informal as possible. I would stress that, as in the case of our participation in the facilities consultative process, we are not seeking to negotiate the resolution of differences but only to establish a mechanism to facilitate the exchange of information and views on these additional issues.

It was apparent from our brief discussion in Dublin that our differing industry and government structures and legal

processes make the establishment of even an informal exchange of views a somewhat complex undertaking, certainly, the Commission must act within the restraints placed on its actions by applicable U.S. law and the internal proceedings which may be necessary to enable it to participate in such an exchange of views. For this reason our proposal at Dublin was limited to the suggestion that an informal working group be formed to explore the topics on which the exchange of views might be useful and to discuss a structure for effecting consultation on these subjects. I continue to believe that a relatively small informal working group is the best means for developing an agenda of topics for discussion and a mechanism for effecting such an exchange.

I am optimistic that discussions such as I have described will lead to better understanding on both sides of the Atlantic. Such understanding may help us fashion, through our own internal processes, policies that are acceptable to all parties and that will best serve all our consumers. I look forward to receiving your views on topics for discussion and a structure for such consultations after your upcoming meeting.

Warm Regards

CHARLES D. FERRIS

Chairman

Federal Communications Commission

Washington, DC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

AFFIDAVIT OF ROBERT E. GOSSE

I, Robert E. Gosse, being first duly sworn, hereby depose and say:

A. During the time period the materials described below were prepared, I served as an attorney in the International and Satellite Facilities Division, assigned to the International Program Staff.

B. As part of my duties in the above position, I assisted in the preparation of or became personally familiar with the documents described below which were subsequently withheld from release to plaintiff ITT World Communications, Inc. following its request pursuant to the Freedom of Information Act which is the subject of this lawsuit.

1. Documents pertaining to an off-the-record meeting on October 3, 1979 among representatives of CEPT, Teleglobe Canada, NTIA, DOS and FCC in Dublin, Ireland, including:

a. Handwritten notes I took concerning the meeting.

b. Handwritten notes taken by James Warwick.

c. Typewritten draft of a compilation of James Warwick's and my notes prepared by me.

d. Copy of typewritten draft of the compilation of notes as described in "b" above with James Warwick's suggested changes.

e. Copy of typewritten draft of compilation of notes as described in "b" above with Thomas J. Casey's suggested changes.

2. Drafts of the October 31, Telexes in #2 of Attachment 1 of the Commission's Memorandum Opinion and Order of February 20, 1980, from Chairman Ferris to Mr. Torsten Larsson, Chairman of CEPT/CLTA,

Central Administration of Swedish Telecommunications prepared on the following dates:

- a. 10/24/79
- b. 10/26/79
- c. 10/29/79
- d. 10/30/79
- e. 10/30/79
- f. 10/31/79

3. Draft of October 31 Telex in #1 of Attachment I from Chairman Ferris to Mr. DeLorme on October 30, 1979.

4. Memorandum dated August 25, 1976 from Joel W. Winnik, Esq. to Walter R. Hinchman, Chief, Common Carrier Bureau, on the subject of Applicability of Re-sale Decision to International Communications market.

5. A one page section entitled "Expansion of Areas of Consultative Contact" of a 28 page memorandum prepared by James Warwick and me on September 1, 1979, for background for FCC attendees of the Dublin, Ireland Conference.

C. In my judgment, based upon my understanding of the Freedom of Information Act, I believe the above materials fall within Exemption 5, (5 U.S.C. § 552(b)(5)): Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

D. The materials described in #1 may be used by the staff in making recommendations to the Commissioners concerning future consultative meetings where Commissioners and representatives of foreign telecommunications entities exchange ideas and data on matters involving foreign telecommunications.

E. The materials described in #2 and #3 are preliminary drafts of Telexes. Although the final drafts were released, the drafts contain various suggestions by the staff as to how the former should be worded, and are predecisional.

F. The memorandum in #4 which I did not prepare, but am personally familiar with, consists of advice and conclusions that were prepared by a staff attorney for the consideration of the Bureau Chief. It is replete with advice, opin-

ions and legal analysis and contains no segregable factual material.

G. The memorandum described in #5 was prepared by myself and James Warwick to assist the Commissioners attending Dublin meetings. The relevant segment contains some background information and opinions and options based upon the background material. Because this background information is presented to assist in the formulation of opinions, advice and options, no segregable factual material is contained therein.

/s/ Robert E. Gosse

[dated JUNE 2, 1980]

PUBLIC NOTICE
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

February 1, 1980

MEETING TO BE HELD TO DISCUSS THE
FEBRUARY 20-21, 1980 MEETING OF
U.S. REPRESENTATIVES WITH
EUROPEAN AND CANADIAN
TELECOMMUNICATIONS ENTITIES

Members of the Commission's Staff will convene a meeting at 2:00 p.m. on February 8, 1980 in Room 511, 1919 M Street, NW., Washington, D.C. to discuss a meeting of representatives of United States, European and Canadian telecommunications entities concerned with international communications to be held in the United Kingdom on February 20-21, 1980. The purpose of the February 20-21 meeting is to informally consult on international communications topics of mutual interest. It is expected that the meeting will produce an exchange of views regarding the opportunities for increasing the range and availability of telecommunications services.

The purpose of the February 8 meeting being convened by the staff is to discuss topics for U.S.-Europe-Canada informal consultations which interested parties wish to suggest. The February 8 meeting is open to the public and all interested parties are invited to participate.

For additional information contact Will Demory (202) 632-3214.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FOIA 9-192

In the Matter of
ITT World Communications Inc.
On Request for Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1980 Released: February 20, 1980

By the Commission:

1. The commission has under consideration the Freedom of Information Act (FOIA)¹ determination of the Chief, Common Carrier Bureau and the General Counsel entered on November 15, 1979, and an application for review of that decision filed by ITT World Communications Inc. (ITT) on December 17, 1979.²

2. ITT seeks access to all documents bearing upon or relating to: (a) communications involving the Commission and representatives of foreign entities attending the recent US/CEPT/TELEGLOBE meeting in Dublin, Ireland;³ (b) communications involving the Commission and any person with respect to dealings between foreign correspondents and U.S. carriers not now providing direct international services; and (c) the willingness of foreign correspondents to consider dealing with U.S. carriers not now providing di-

¹ U.S.C. § 552; 47 C.F.R. § 0.461.

² ITT also filed a letter supplement to its application for review on December 26, 1979.

³ This conference was held on October 2-3, 1979, and was a result of the authorization of an additional transatlantic submarine cable (TAT 7). See, e.g., AT&T Co., 73 FCC 2d 248 (1979). The Dublin conference was but one aspect of a planned international consultative process initiated to assure that future decisions relating to facilities authorizations are based upon the fullest factual record and a knowledge of the methodologies and data bases used by the European government correspondents. Such international conferences are designed to exchange views between government entities.

rect international services. In its ruling, the staff permitted release of eight (8) categories of records; it declined access, however, to fifteen other classes of information upon the ground that these documents consisted of internal agency memoranda insulated from inspection by Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5).⁴ The staff indexed and described the fifteen documents which were withheld from inspection. Annexed hereto is Attachment I describing the documents released. Annexed also is Attachment II with expanded descriptions of the items being withheld. Seven categories of documents withheld were related to the Dublin conference. Of the remaining eight, one is a memorandum from a staff attorney to a Bureau chief, another is a memorandum from a Commissioner to the Chairman, and the remaining six are memoranda to Commissioners from their legal assistants.

3. On appeal, ITT presents several arguments why inspection of the withheld documents should be granted. The requester asserts, respecting the records relating to the Dublin conference, that Exemption 5 does not apply because: (1) the contents of the documents were disclosed to foreign governments and corporations;⁵ (2) the documents reflect final agency opinions or adopted policy; and (3) the records indicate that the agency has engaged in *ultra vires* actions. Moreover, with respect to all the withheld records, ITT urges that the Commission permit discretionary access and, in any event, that all segregable factual portions should be disclosed.

4. As to its first argument, that certain of the documents have lost their privileged-deliberative status since their substance or purport was disclosed during the course of discussions with other Dublin conferees, ITT's contention

⁴ Exemption 5 provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are not subject to mandatory disclosure. 5 U.S.C. § 552(b)(5). See *EPA v. Mink*, 410 U.S. 73 (1973).

⁵ In its supplement, ITT claims that any disclosures made at this meeting would have not only involved foreign governments, but privately owned foreign carriers who were also in attendance.

must fail. At the outset, it should be emphasized that the purpose of Exemption 5 is to protect the "consultative functions" of government by furthering open and frank discussions within and between agencies concerning government policies. *EPA v. Mink*, *supra*, 410 U.S. at 87. If discussions conducted among government officials and their foreign partners could, in this context, automatically trigger a waiver of Exemption 5's protection, it would effectively destroy the underlying purpose for which Exemption 5 was enacted. See also *Carlisle Tire & Rubber Co. v. Customs Service*, Nos. 78-2001, 78-2002, 79-1224, D.D.C., Nov. 21, 1979. Consequently, this result would seriously impair the candid exchange of views necessary for the Commission to discharge its statutory responsibilities. Cf. *Murphy v. Department of the Army*, No. 78-1258, D.C. Cir., Dec. 21, 1979. Moreover, it has been held that "limited disclosures to proper outside persons as are necessary to carry out effectively a purpose for assembling a governmental report in the first place do not waive its privilege." *Cooper v. Department of the Navy*, 558 F.2d 274, 278 (5th Cir. 1977), *cert. denied*, No. 79-171, U.S. Sup. Ct., Oct. 29, 1979. Accordingly, if limited disclosures to "proper outside persons" do not waive the deliberative privilege then *a fortiori* discussions among governmental officials do not invalidate the protection accorded privileged materials by Exemption 5.* See also *Gulf & Western Industries, Inc. v. United States*, No. 79-1646, D.C. Cir., Nov. 6, 1979.

5. In the instant case, no evidence has been presented by ITT, and we know of none, that the documents or their contents were ever disclosed to any unauthorized person. For example, Item No. 1, encompassing six (6) categories of records, was prepared by FCC staff personnel after the meeting, and thus could not have been disclosed to the conferees. Items 2 and 3 are preliminary drafts of Telexes, the final versions of which were released. Items 5-7 are confi-

* In this context, the agency's communication is deemed "deliberative" where it relates "to the process by which policies are formulated." *Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*).

dential briefing memoranda prepared by agency attendees and no disclosure of these documents has been made.⁷ Item 8 is an unused draft of a speech prepared for, but not delivered by, the Commission's Chairman. Obviously, this undelivered speech was not disclosed. Further, ITT advances no precedential support for the proposition that an otherwise confidential document loses its privileged character because the recipient gleans information therefrom or that it otherwise influences the recipient's thinking if manifested in subsequent conversation. Indeed, the cases, as discussed above, suggest a contrary result. If ITT's proposition were the case, no agency document could retain its privileged status unless the recipient took no action after receiving the confidential information. As we understand the rationale underlying Exemption 5, it was precisely enacted to protect confidential communications between decisionmakers in order to assist them in reaching informed decisions, and to insulate the public from the "confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon." *Jordan v. Department of Justice*, *supra*, 591 F.2d at 772-73.

6. Moreover, while we are mindful that the FOIA requires agency disclosure of "those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register," 5 U.S.C. § 552(a)(2)(B), the documents at issue do not meet that description. ITT suggests that the withheld documents "may merely include statements and interpretations of such adopted policy." In this line, ITT seeks support from *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), which requires the disclosure of final opinions and interpretations which embody an agency's effective law and policy. 421 U.S. at 152. ITT contends that "the Commission has already decided to meet with foreign telecommunications entities, and begun to act upon a policy which it has not yet fully disclosed." We disagree.

⁷ See note 10 *infra* re: segregable factual material.

7. In no sense of the term do these documents constitute the "working law" of the agency. *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 152-53. The documents do not, and cannot, represent final agency action. The Dublin meetings, attended by three of the seven Commissioners, was a consultative conference between appropriate telecommunications entities exclusively designed to exchange views on future transatlantic telecommunications matters. The Commissioners at this meeting did not, and as a matter of law could not, adopt policies pending before the Commission since they did not constitute a majority of the Commission. The memoranda generated by Commission staff as a result of this conference do not represent final agency action nor did the documents prepared in advance of the meeting in any way constitute statements adopted by the agency. The records sought are precisely the kind of predecisional communications that Exemption 5 is designed to protect. *See Jordan v. Department of Justice*, *supra*, 591 F.2d at 772-74. Thus, the records are immune from discovery.

8. ITT further argues that nondisclosure cannot be sustained by the staff's concern that disclosure would compromise a critical means by which the United States gains insight into the status of foreign governments' telecommunications policies. ITT contends that the Commission lacks the requisite legal authority to negotiate with foreign governments.⁸ It therefore concludes that the Commission's participation is *ultra vires* and the documents cannot be deemed exempt. This proposition is clearly erroneous. The Commission, along with other authorized governmental agencies, attends these conferences to share and exchange points of view regarding future international telecommunications planning. The Commission must attend such conferences in order to discharge its non-delegable duty to authorize international wire and radio communications in the public interest (*See* Titles II and III of the

⁸ ITT indicates that it has filed a Petition for Rulemaking (RM-3523) addressing the proposition that meetings between the Commission and foreign administrations may constitute *ultra vires* activity.

Communications Act of 1934, as amended, 47 U.S.C. Titles II and III and the Communications Satellite Act of 1962, 47 U.S.C. § 701-744) and to regulate "interstate and *foreign* commerce in communications so as to make available ... to all the people of the United States a rapid, efficient ... *world-wide* wire and radio communications service with adequate facilities at reasonable charges...." 47 U.S.C. § 151. (Emphasis added.) In accordance therewith, the Commission is obligated to determine the merits of international facilities applications and the rates charged thereunder as they are filed by the carriers. In view of the Commission's statutory responsibilities and the necessity to cooperate with foreign entities in this ongoing facilities planning process, ITT's assertion is plainly incorrect.

9. ITT also requests that the Commission invoke its discretion and release the withheld records, or, in any event, release any segregable factual portions contained therein. The requester notes that agencies have been encouraged to make disclosure where it would not cause significant harm to governmental interests.⁹ ITT states that the rule requires a weighing of policy considerations and that here the circumstances warrant disclosure. *See* 47 C.F.R. § 0.461(f)(4). It also states that all segregable factual materials must be disclosed. *EPA v. Mink, supra*, 410 U.S. 73.

10. We have carefully reviewed the staff's initial action and find that it should be affirmed.¹⁰ The documents were properly withheld pursuant to Exemption 5. Thus, Item No. 15 consists of predecisional recommendations from one Commissioner to another. The six memoranda from staff

⁹ *EPA v. Mink, supra*, 410 U.S. 73, 80; *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Department of Justice, *Policy Guide: When to Assert the Deliberative Privilege Under Exemption 5*.

¹⁰ Upon review, however, we believe that Item 6 and portions of Items 7 and 10 are factual in nature and not otherwise inextricably intertwined with exempt material. Consequently, they must be released. *See Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). The material being released here should be distinguished from factual summaries and other factual material that are an integral part of staff analysis and recommendations. The latter are entwined in the deliberative process and are therefore exempt. *See* footnote 11, *infra*.

assistants to Commissioners (Items 9-14) are replete with advice, opinions, alternatives and recommendations. They were submitted as guidance for the Commissioners during their deliberations. The memoranda are deliberative in nature and are an integral part of the agency's decision-making process. Item No. 4 consists of the legal advice and opinions of an attorney to a bureau chief. The Dublin conference and the various memoranda related thereto were likewise intended to assist the Commission in gathering information concerning international facilities matters which ultimately will be presented for its determination. The memoranda are therefore deliberative and predecisional materials. The release of the documents ITT seeks would seriously erode the Commission's ability to secure the candid and uninhibited advice of its staff as well as that of foreign entities. Hence, communications of this nature must remain confidential. *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 175. *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Jordan v. Department of Justice*, *supra*. We also find that factual summaries, culled by the staff from the public record to assist the Commission in reaching a decision, are similarly exempt from mandatory disclosure since they constitute the staff's view of the facts which Commissioners should give priority to in their consultations and in making subsequent decisions.¹¹

11. We adhere to the principle, as did Congress in its design of Exemption 5, that privileged governmental communications should be shielded in order to protect the "consultative functions" of government absent some strong countervailing circumstances. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 919, *cert. denied*, 389 U.S. 952 (1967); *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 482 F.2d 710 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975). The Commission has not reached any decision on

¹¹ See *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974). See also *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 250 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Mobil Oil Corp. v. FTC*, 406 F. Supp. 306, 315 (S.D.N.Y. 1976). But see footnote 10, *supra*.

the matters which the Dublin conference addressed; but the materials in Item No. 1 may be used by the staff in making recommendations to the Commission on such matters. Thus, disclosure of the notes in Item No. 1 would inhibit the free flow of communications necessary to effective decision-making. The prospect of disclosure would, in our view, tend to discourage these candid exchanges vital to the development of effective international facilities planning. We conclude therefore that discretionary release would impair the integrity of the decisional process which commands that "officials be judged by what they decided, not for matters they considered before making up their minds." *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, *supra*, 482 F.2d at 718. ITT has advanced no compelling public interest reason as to how the public generally will benefit from release of this exempt information; and, therefore, the potential for harm to efficient governmental policy formulation is not counterweighted by any prospect that discretionary release will promote the public interest.

12. Accordingly, IT IS ORDERED, that except as otherwise indicated herein, the Application for Review filed on behalf of ITT World Communications Inc. IS DENIED. Judicial review of this decision may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the Following Commissioners: Charles D. Ferris, Robert E. Lee, James H. Quello, Abbott Washburn, Joseph R. Fogarty, Tyrone Brown, Anne P. Jones.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO
Secretary

ATTACHMENT I**Material Available for Inspection**

Copy of Telex from Chairman Charles Ferris to Mr. Jean-Claude Delorme, President of Teleglobe Canada, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.

Copy of Telex from Chairman Charles Ferris to Mr. Torsten Larsson, Chairman of CEPT/CLTA, Central Administration of Swedish Telecommunications, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.

Five pages, pp. 106-11, of Transcript of CEPT/U.S.A./Teleglobe Canada, concerning consultative process on North Atlantic Telecommunications, Montreal, Canada, March 22-23, 1979.

Telexes, 8/5/77, 6/3/77.

A letter dated March 1, 1979, to Mr. Robert Bruce, FCC, from Mr. Robert Seguin of Teleglobe Canada, with attachments.

Letter dated September 21, 1979, to Commissioner Fogarty from Bertram B. Tower, ITT World Communications.

Telex dated March 13, 1979 from Robert Seguin of Teleglobe Canada to Robert R. Bruce, Esq., General Counsel, FCC and Mr. Enrico Brizzi, of Italcable, Rome, Italy, concerning a conference report to be given at the Montreal, Canada, March, 1979 consultative meeting.

Telex dated March 20, 1979 from Robert R. Bruce, Esq., General Counsel, FCC to Mr. Enrico Brizzi, Chairman, CEPT/STA, Italcable, Rome, Italy, concerning the future of the consultative process.

ATTACHMENT II**Material Not Released for Inspection**

1. The following transcripts and comments regarding an off-the-record meeting on October 3, 1979, among representatives of CEPT, Canada, NTIA, DOS and FCC in Dublin, Ireland, including:

- a. Handwritten notes of R.E. Gosse, Esq.—8 pages.
- b. Handwritten notes of James Warwick, dated 10/3/79—4 pages.
- c. Typewritten draft of compilation of Gosse and Warwick notes prepared by R.E. Gosse, Esq. dated October 12, 1979, and titled "Notes of Informal Meeting of CEPT/TELEGLOBE/US pertaining to expansion of the areas of consultative contact." See paragraphs 10-11 of the text of the decision—11 pages.
- d. Copy of typewritten draft of compilation of notes as described in "c" above with James Warwick's suggested changes—11 pages.
- e. Copy of typewritten draft of compilation of notes as described in "c" above with Thomas J. Casey's, Esq. suggested changes—11 pages.
- f. Handwritten note from Thomas J. Casey, Esq. to Robert E. Gosse, Esq. regarding typewritten compilation—1 page. (This document will be disclosed.)

2. Drafts of the October 31, Telexes in #2 of Attachment I from Chairman Ferris to Mr. Torsten Larsson, Chairman of CEPT/ELTA, Central Administration of Swedish Telecommunications on the following dates:

- a. 10/24/79
- b. 10/26/79
- c. 10/29/79
- d. 10/30/79
- e. 10/30/79
- f. 10/31/79

The final version of these preliminary drafts was released.

3. Draft of October 31 Telex in #1 of Attachment I from Chairman Ferris to Mr. DeLorme on 10/30/79.

A copy of the finalized telex was also released.

4. Five-page memorandum dated August 25, 1976 from Joel S. Winnik, Esq. to Walter R. Hinchman, Chief, Common Carrier Bureau, on subject of Applicability of Resale Decision to international communications market. The document consists of staff attorney's legal interpretations of the implications of certain Commission decisions. The memorandum addresses various questions regarding the applicability of the *Report and Order in Docket No. 20097* (Resale Decision) to Section 214 authorizations to serve international points, in general, and in particular, to the applications of Graphnet Systems, Inc. to supplement its present authority to serve Hawaii and to serve various European points, and the application of Telenet Communications to extend its packet-switched circuits to the United Kingdom and points beyond.

5. One page section of Memorandum (28 pages) entitled "Expansion of Areas of Consultative Contact" prepared by R.E. Gosse, Esq. and James Warwick in September, 1979, for background for FCC attendees of Dublin, Ireland Conference. The pertinent section consists of staff recommendations.

6. Background memo consisting of 21 pages undated from Russell Frisby, Esq. to James Smith, Esq. prepared in September, 1979, for FCC attendees of Dublin, Ireland, regarding Section 214 Applications for provision of International Service. This document is being released. The document is a factual summary of Section 214 application proceedings which have evoked responses from European countries.

7. Background memo undated from Russell Frisby, Esq. to James Smith, Esq. for FCC attendees of Dublin, Ireland prepared on subject of CCI and International Television. The first two pages of this 9 page memo consist of a summary of factual material which will be released. The residue includes summaries, characterizations and staff views concerning matters which might arise in discussion at the Dublin conference.

8. Unused draft consisting of 27 pages (undated) prepared by his staff for Chairman Ferris' opening remarks for Dublin, Ireland conference.

9. One page memorandum dated April 26, 1979 prepared by Sebastian A. Lasher for Commissioner Abbott Washburn containing recommendations for an agenda item regarding the revision of authorization of Graphnet Systems, Inc. to comply with decision of U.S. Court of Appeals, 2nd Circuit in No. 77-4928.

10. Intra-office memorandum, dated December 16, 1976, consisting of 6 pages, to Commissioner Fogarty from Angela Shaw, the Commissioner's Attorney-Advisor, on the subject of the December 10, 1976 Reston meeting with carriers on transatlantic cable and satellite licensing, the last four pages of which are factual in nature and will be released. The remainder does not contain any factual material that is segregable from deliberative material, but consists of a staff member's recommendations regarding the issues to be discussed.

11. Undated two page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, summarizing Common Carrier No. 1 (TAT-7, Docket No. 18875 Reconsideration), Special Meeting of October 25, 1978, re: TAT-7, Docket No. 18875 reconsideration, and containing a staff member's recommendations.

12. Undated two page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, the Commissioner's Attorney-Advisor, on Item No. 1 for the Special Meeting of February 22, 1979, re: Docket 18875, Phase III. It consists of staff recommendations.

13. Undated 11 page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: Trans-atlantic Communications Facilities/Planning agenda item, concerning, e.g., TAT-7, INTELSAT 5, and Docket 18875. It consists of a staff member's recommendations.

14. Undated four page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: "Trans-atlantic Communications Facilities/Comments on AT&T's August 31 filing." It consists of a staff member's analysis and evaluation of an AT&T pleading.

15. One page inter-office memorandum from Commissioner Fogarty to Chairman Ferris, dated October 5, 1978, re: DOD Briefing on National Defense Requirements for Additional International Cable Facilities. The memo contains recommendations on whether the Commission should have a national security briefing by the Department of Defense in association with Docket 18875, Transatlantic Facilities.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

AFFIDAVIT

I, H. Russell Frisby, Jr., being first duly sworn, hereby depose and say:

1. I am an attorney-advisor, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Washington, D.C.

2. During September, 1979, I was asked by the Office of the Bureau Chief to prepare a memorandum on what issues I felt would be important to the European representatives at the upcoming Dublin, Ireland Conference. The Conference was ultimately held on October 2-3, 1979.

3. Pursuant to the above request, I prepared an undated background memorandum directed to James Smith, Esq., to assist those Commission representatives attending the conference in Dublin. The memorandum specifically dealt with CCI and International Television. It contained my thoughts on what information would be useful to the Commissioners in discussing the above two issues.

4. The last seven pages of this nine page memorandum were withheld by the Commission from ITT World Communications, Inc. pursuant to a request they made under the Freedom of Information Act. In the index attached to the Commission's Memorandum Opinion and Order in the matter, this memorandum in question was listed as item #7.

5. I believe the Commission properly withheld the last seven pages of the memorandum I wrote because that

portion contained matters I believed the individual Commissioners should consider in preparing to attend the Dublin Conference.

/s/ H. Russell Frisby, Jr. _____

[Dated APRIL 15, 1980]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

DEFENDANT'S RESPONSE TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES

Interrogatory No. 1

This interrogatory pertains to the meeting between Commission representatives and representatives of foreign administrations and carriers which was held in Dublin during October 1979, in connection with a North Atlantic Planning Conference, and from which representatives of the United States carriers were absent.

(a) Identify all persons who were present at the meeting.

ANSWER

No master list of attendees at the subject meeting was made. Consequently, the following list is constructed from memory and may not be complete.

Commission:

Chairman Ferris
Commissioner Lee
Commissioner Fogarty
Mr. Robert Bruce
Mr. Philip Verveer
Mr. Eliot Maxwell
Mr. Thomas Casey
Mr. James Warwick
Mr. Robert Gosse

Department of State:

Mrs. Ruth Phillips

*National Telecommunications and
Information Administration*

Lawrence O'Neill
Edward Greenberg

*European and Canadian Telecommunications**Representatives:*

Mr. Torsten Larsson, Sweden
Mr. James Hodgson, United Kingdom
Mr. G. Baggenstos, Switzerland
Mr. J. Crenier, France
Mr. J. Delorme, Canada
Mr. E. Brizzi, Italy

(b) State whether there was any mention or discussion at the meeting of the policies, preferences, or practices of (1) the Commission and/or (2) any foreign administration or carriers to provide any international communication service. Provide the following information with respect to each instance in which such subject(s) were mentioned or discussed:

(i) Identify the person or persons who mentioned or discussed the subject.

(ii) Fully describe the substance of the statements which each such person(s) made.

(iii) Identify any person who responded to those statements, and fully describe the substance of his response.

ANSWER:

Defendant objects to these questions on the grounds that they solicit information which is irrelevant to this action. To the extent that plaintiff seeks relief under the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. § 552b, plaintiff must establish that the Act applies to meetings attended by Commission members. In the list of attendees given in response to Interrogatory No. 1, defendant has identified the attendees; it is apparent from that list that there was no quorum of the Commission present, and the meeting therefore is not within the provisions of the Sunshine Act. Furthermore, to come within the provisions of the Sunshine Act, plaintiff must also establish that the meeting consisted of deliberations and determinations by the Commission of matters within the jurisdiction of the Commission. To the extent that plaintiff seeks to know what "mention" or "discussion" took place on various

topics at the meeting, the question does not go to deliberations by the Commission and is therefore irrelevant to this action.

(c) State whether there was any mention or discussion at the meeting of the desirability, or undesirability, of allowing new or additional carriers to provide any international communications service. Provide the information specified in Subparagraphs (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

ANSWER:

Same as response to Interrogatory No. 1(b).

(d) State whether there was any mention or discussion at the meeting of the possibility that foreign administrations will, and/or should, take any action or adopt any official position or policy in consideration of, or in response to, any action or decision which the FCC may have taken at the foreign administration's behest or suggestion. Provide the information specified in Subparagraphs (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

ANSWER:

Same as response to Interrogatory No. 1(b).

(e) State whether there was any mention or discussion at the meeting of any new carrier and/or the communications services offered, or proposed to be offered, by any of those carriers. Provide the information specified in subparagraphs (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

ANSWER:

Same as response to Interrogatory No. 1(b).

(f) State whether there was any mention, discussion, or explanation at the meeting of any past or contemplated action or decision of the FCC. Provide the information specified in Subparagraph (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

ANSWER:

Same as response to Interrogatories Nos. 1(b)-(e).

(g) Describe the substance of all remarks which were made by each person at the meeting, which are not fully described in response to Paragraphs (b)-(f) above.

ANSWER:

Same as responses to Interrogatories No. 1(b).

(h) State whether any document has been prepared which reflects in whole or in part, anything which transpired at the meeting.

ANSWER:

A compilation of notes was prepared.

(i)(a) Identify the person by whom the document was prepared.

ANSWER:

Robert E. Gosse

James C. Warwick

Thomas J. Casey

(i)(b) Identify each person to whom the document was circulated or shown.

ANSWER:

Defendant objects to this question on the ground that the fact of to whom a document reflecting what transpired at a meeting attended by Commission members was shown is irrelevant to plaintiff's claim that the Sunshine Act requires the Commission to hold open meetings when conferring with foreign telecommunications entities.

(iii) State the date on which the document was prepared.

ANSWER:

The week of October 10, 1979.

(iii) Describe the purpose for which the document was prepared.

ANSWER:

Defendant objects to this question on the ground that the reason the Commission or Commission staff prepared a document relating to discussions with foreign telecommunications entities is irrelevant to plaintiff's claim that the Com-

mission is required by the Sunshine Act to hold open meetings with foreign telecommunications entities.

Defendant also states that the document identified in response to Interrogatory No. 1(h)(i)(a) is listed as not available for inspection in Attachment II of the Commission's February 26, 1980 order which denied in part plaintiff's application for review of the Commission's previous partial denial of plaintiff's request under the Freedom of Information Act.

INTERROGATORY NO. 2

State whether any representative of the commission has held any other meeting with representatives of foreign administrations or carriers, at which the United States carriers were absent, and at which one or more of the subjects described in Paragraphs (b) through (f) of Interrogatory No. 1 were discussed. Provide the following information with respect to each such meeting, (including the meeting which is scheduled to occur in England on February 20-21, 1980):

(a) State the date and location of the meeting.

ANSWER:

(1) Ascot, near London, England on February 20-21, 1980.

(b) Provide the information specified in Paragraphs (a)-(h) of Interrogatory No. 1 above.

ANSWER:

(a) Persons who were present at the meeting:

United States of America

Federal Communications Commission:

Mr. C.D. Ferris

Mr. J.R. Fogarty

Ms. A. Jones

Mr. Philip Verveer

Mr. W. Demory

Department of State

Mr. A.L. Freeman

National Telecommunications and

Information Administration

Ms. V. Ahern

*Canada**Teleglobe, Canada:*

Mr. J.C. Delorme

Mr. A.G. Wallace

CEPT:

Mr. F. Thabard, France

Mr. H.P. Wirz, Germany (Fed. Rep. Of)

Mr. V. Ortoleva

Mr. G. Spasiano, Italy

Mr. B. Vree, Netherlands

Mr. F. Molina Negro, Spain

Mr. T. Larsson

Mr. B. Naslund (Secretary), Sweden

Mr. A. Hawkins, United Kingdom

(b)-(g) Defendants object to the questions contained in the paragraphs of Interrogatory No. 1 on the same grounds and for the same reasons as they were objected to in response to Interrogatory No. 1.

(h) State whether any document has been prepared which reflects in whole or in part, anything which transpired at the meeting.

ANSWER:

A document entitled "SUMMARY REPORT OF INFORMAL CEPT/NORTH AMERICAN DISCUSSIONS ON TRANSATLANTIC TELECOMMUNICATIONS—ASCOT, UNITED KINGDOM 20-21 FEBRUARY 1980" was prepared and agreed to during the meeting by the participants therein. The summary report was prepared to provide a record of the meeting. The report has been made available to plaintiff.

Ms. Veronica Ahern of the National Telecommunications and Information Administration prepared a memorandum entitled "Report of Informal Discussions, February 20-21, Ascot, England." The Commission objects to the release of this report because it is an intra-agency memorandum prepared for the use of the National Telecommunications and Information Administration.

(2) Common Carrier Bureau staff members have discussed among other things the topics of new international

carriers and services with representatives of the British Post Office. The meeting was held on February 7, 1980 at 1919 M Street, NW., Washington, D.C.

(a) Persons who were present at the meeting:

Common Carrier Bureau

Participants

Mr. Philip L. Verveer

Mr. Willard L. Demory

Ms. Sue D. Blumenfeld

British Post Office

Participants

Mr. Mike Morris

Mr. Fred Dunn

Mr. Bob Hinde

(b)-(g) Defendants object to the questions contained in the paragraphs of Interrogatory No. 1 on the same grounds and for the same reasons as they were objected to in response to Interrogatory No. 1.

(h) State whether any document has been prepared which reflects in whole or in part, anything transpired at the meeting.

ANSWER:

No such document was prepared.

INTERROGATORY NO. 3

State whether the Commission plans or contemplates holding any future meetings with representatives of foreign administrations or carriers. If any such meeting is planned or contemplated, provide the following information:

(a) State the date and place for which the meeting is planned;

(b) Identify the persons who have been, or will be, invited to the meeting;

(c) Describe each matter or subject which is expected to be discussed at the meeting; and

(d) Identify all documents which refer or relate to the planned meeting.

ANSWER:

The Commission does contemplate holding future meetings with representatives of foreign administrations or carriers at which the topics of new international carriers and services will be discussed. No dates for such future meetings have been set at this time nor has any determination been made of who shall attend future meetings. However, Commission representatives to the July 10-11, 1980 Senior

Level meeting of the North Atlantic Facilities Consultative Process will meet with representatives of the European and Canadian telecommunications entities in attendance to (1) decide whether a future meeting should be held to address new international carriers and services and other topics; and (2) if such meeting is to be held, to agree on a date and place for that meeting. While no definite arrangements for this procedural meeting have been made, the Commission contemplates that the meeting will be attended by representatives of the Commission, NTIA, the Department of State and of the European and Canadian telecommunications entities attending the Senior Level meeting. No decision has been made as to whether representatives of the U.S. carriers and Comsat attending the Senior Level meeting will be permitted to attend this procedural meeting. The Commission's representatives to the Senior Level meeting are expected to be: Chairman Ferris, Commissioner Lee, Commissioner Fogarty, Mr. Robert Bruce, Mr. Philip Verveer, Mr. Willard Demory and Mr. James Warwick.

INTERROGATORY NO. 4

Provide the following information with respect to (1) the Dublin meeting to which Interrogatory No. 1 refers, (2) the England meeting to which reference is made in Interrogatory No. 2, (3) any other meeting identified in response to Interrogatory No. 2, and (4) any future meeting identified in response to Interrogatory No. 3 between Commission representatives and representatives of the foreign administrations and carriers:

(a) State whether the Commission has decided or agreed to exclude representatives of the United States carriers from any or all such meetings.

(b) If the Commission has decided or agreed to exclude representatives of United States carriers from any meeting with foreign administrations or carriers, provide the following information with respect to each such decision or agreement:

(i) Identify the person or persons by whom the decision was made or with whom the agreement was reached.

(ii) State the reason or reasons for the decision or agreement.

(iii) Describe the notice and opportunity to comment which the Commission afforded interested parties in connection with its consideration of the possible exclusion of United States carriers from the meeting.

(iv) Describe the manner in which the decision or agreement was made to exclude representatives of the United States carriers from the meeting, and state the date on which the decision was made or agreement reached.

(v) State specifically (a) whether the Commission's General Counsel has certified, publically or otherwise, that representatives of the United States carriers could be excluded from the meeting; (b) whether a majority of the Commission and/or its Telephone and Telegraph Committee have voted to exclude representatives of the United States carriers from the meeting (and if so, state whether the vote was recorded and the manner in which each Commission voted); and (c) whether a transcript, electronic recording, and/or minutes of the meeting were made and retained.

(vi) Identify all documents which refer or relate to the decision or agreement to exclude United States carriers from the meeting.

ANSWER:

1. (Dublin meeting) The Commission representatives to the Senior Level meeting of the North Atlantic and Facilities Consultative Process held in Dublin, Ireland on October 2-3, 1979 agreed to exclude representatives of the U.S. carriers and Comsat from the informal meeting with representatives of European and Canadian Telecommunications entities where the desirability of initiating consultations on the subjects of new international carrier and services and other topics was discussed.

2. (England meeting) With respect to the February 20-21, 1980 meeting in Ascot, United Kingdom, a Commission employee asked a representative of the British Post Office, the host of that meeting, whether representatives of the U.S. carriers, Comsat and other interested U.S. persons could attend the meeting. The representative of the

British Post Office indicated that there were insufficient accommodations for additional attendees.

3. Whether or not representatives of the U.S. carriers and Comsat will be permitted to attend such meetings in the future has not been decided at this time. Defendant objects to the questions in paragraphs (b)(i)-(v) of Interrogatory No. 4 on the grounds that how, by whom and for what reason representatives of telecommunications carriers were excluded from meetings with foreign telecommunications entities which were attended by Commission members is irrelevant to the issue of whether the meetings fall within the provisions of the Sunshine Act. It is clear from the list of attendees listed in answer to Interrogatory No. 1 that the meetings are not covered by the Act, and defendant was therefore not required to conduct the meetings, including decisions to exclude carriers from the meetings, according to the Sunshine Act.

INTERROGATORY NO. 5

State whether any Commission representatives have had any communication with any representative of a foreign administration or carrier, which is not fully described in response to Interrogatory Nos. 1, 2, and 3 above, during which one or more of the following subjects were mentioned or discussed:

(a) The policies, preferences, or official positions of (i) the Commission or (ii) any foreign administration or carrier with respect to the authorization of new or additional carriers to provide any international communication service;

(b) The desirability, or undesirability, of allowing new or additional carriers to provide any international communication service;

(c) The possibility that foreign administrations will or should take any action or adopt any official position or policy in consideration of, or in response to, any action or decision which the FCC may have taken at the foreign administration's behest or suggestion;

(d) Any new carrier and/or the communication services offered, or proposed to be offered, by any of these carriers; and/or

(e) The desirability of meetings between the Commission and foreign administrations or carriers to discuss one or more of the subjects specified in Paragraphs (a)-(d) above, and/or any actual or proposed meeting to discuss those subjects.

If there have been any such additional communications, provide the following information concerning each communication:

- (i) Describe fully the substance of each communication;
- (ii) Describe the manner in which the communication was made (*e.g.*, oral statement, letter, telex, or telephone call);
- (iii) Identify (a) the Commission representative and (b) the representative of the foreign administration or carrier who were parties to the communication;
- (iv) Identify all other persons who were present when the communication was made, or to whom the substance of the communication was communicated;
- (v) State the date, or approximate date, on which the communication occurred;
- (vi) Identify the location at which the communication was made; and
- (vii) Identify all documents which refer or relate to, or which constitute, the communication.

ANSWER:

Defendant objects to this Interrogatory on the ground that it is irrelevant to this action. To the extent that plaintiff seeks relief under the Sunshine Act, plaintiff would only be entitled to either attend meetings of the Commission which fall within the definition of meeting contained in the act, or, to the extent not authorized to be withheld, to have access to transcripts or minutes of meetings which were closed by the Commission pursuant to the Act. Plaintiff would not be entitled to information regarding any other discussions or conversations of Commission members or staff. Furthermore, conversations and discussions are not meetings within the definition of the act because they do not constitute deliberations of a collegial body.

INTERROGATORY NO. 6

State whether the Commission has adopted any formal or informal policy, rule or practice or procedure, and/or other

guidelines which pertain to (1) the manner in which Commission representatives can or should conduct themselves in meetings and/or communications with foreign carriers or administrations and/or (2) the subjects and matters which may, or may not, properly be discussed with foreign administrations or carriers.

(a) If such a policy, rule or guideline has been adopted, provide a citation to any published statement thereof in the *Code of Federal Regulations* and/or the *Federal Register*. In the event that there is no published statement in the *C.F.R.* or *Federal Register*, provide the following information with respect to each such policy, rule and/or guidelines.

(i) State the substance of the policy, rule or guideline;

(ii) Identify the person or persons by whom the policy, rule or guideline was adopted, and state the date of its adoption;

(iii) Describe the procedure pursuant to which the policy, rule or guideline was adopted, including a description of any notice or opportunity to be heard which was afforded interested parties before the policy, rule or guideline was adopted.

(iv) Identify all documents which refer or relate to, or which constitute, the policy, rule or guideline.

(b) Are there any restraints or restrictions on the discussions or communications of Commission representatives with foreign administrations or carriers which are not fully described in response to the preceding paragraph of this interrogatory? If so, identify and describe those restraints and/or restrictions.

ANSWER:

The Commission has not adopted any formal or informal policy, rule of practice or procedure or any guideline which pertains to the manner in which Commission representatives will conduct themselves in meetings with foreign carriers or administrations or the subjects which may be discussed with foreign administrations or carriers.

Plaintiff has filed a petition for rulemaking at the Federal Communications Commission. *Petition of ITT World Communications, Inc. for rulemaking concerning contacts be-*

tween the FCC and foreign telecommunications administrations with respect to future international communication services and entry of new common carriers (RM 3523). The Commission has adopted a memorandum opinion and order disposing of that petition. That order covers the issues raised in Interrogatory No. 6 and plaintiff will receive a copy of it soon.

INTERROGATORY NO. 7

State whether the Commission has adopted any formal or informal policy, rule of practice or procedure and/or other mechanism pursuant to which factual information communicated to Commission representatives by foreign administrations or carriers will or may be made part of the record in any administrative proceeding before the Commission to which such information may be relevant (including, without limitation, the Commission's consideration of any operating agreements which any new carrier may subsequently negotiate with any foreign administration).

(a) In the event that the Commission has adopted any such policy, rule or mechanism, provide the following information:

(i) Describe the manner in which the policy, rule or mechanism would operate, including, without limitation, an explanation of the opportunity which interested parties will have to investigate the veracity of the information in question and to discovery supplemental or contradictory information from foreign administrations or carriers.

(ii) Describe the manner in which the policy, rule or mechanism was adopted by the commission, state the date of its adoption, and identify the person or person who decided to adopt the policy, rule or mechanism.

(iii) Identify all documents which refer or relate to, or which constitute, the policy, rule or mechanism.

(b) Fully describe any other action, not described in response to the previous paragraph, which the Commission has or intends to take to prevent interested parties from being prejudiced in subsequent Commission proceedings by virtue of their exclusion from meetings or communications between Commission representatives and foreign administrations and carriers.

ANSWER:

Defendant has dealt with the matters raised in this interrogatory in its response to plaintiff's rulemaking petition discussed in the answer to Interrogatory No. 6.

INTERROGATORY NO. 8

State whether the Commission intends to do or attempt to do any of the following in the event that it meets or communicates in the future with foreign administrations or carriers:

(a) Negotiate with the foreign administrations or carriers;

(b) Narrow differences between the Commission and foreign administrations or carriers, and move toward consensus;

(c) Discuss the services or capabilities of any particular United States carrier;

(d) Ask foreign administrations (1) to enter into operating agreements with any particular carriers, and/or (ii) to adopt policies of permitting and/or encouraging new or additional carriers to provide international communication services; or

(e) Assert or suggest that foreign administrations or carriers should take any action, or adopt any policy, because the FCC has taken any action which was purportedly requested or sought by those foreign administrations or carriers.

ANSWER:

The Commission does contemplate holding future meetings with representatives of foreign administrations or carriers at which the topics of new international carriers and services will be discussed. No date for such future meetings or the subjects which will be discussed has been set.

INTERROGATORY NO. 9

(a) Fully describe the functions, duties, and/or responsibilities which the Commission has delegated and/or assigned to its Telephone and Telegraph Committee (i) generally and/or (ii) in connection with meetings or communications with foreign administrations and carriers.

(b) Identify all documents which set forth or describe, in whole or in part, the functions, duties and /or responsibilities of the Telephone and Telegraph Committee.

ANSWER:

The Commission's Rules and Regulations contain the following provision:

§ 0.215 Telecommunications Committee.

A telecommunications Committee, composed of three Commissioners, designated as such by the Commission, or a majority thereof, will act, except as otherwise ordered by the Commission, upon all applications or requests (except requests for special temporary authorization covered by § 0.291) submitted under Sections 214 or 319 of the Communications Act of 1934, as amended, by communications common carriers, where the estimated cost of construction (or value or radio facilities where an assignment or transfer of facilities is involved) is in excess of \$10 million.

INTERROGATORY NO. 10

State whether the Department of State has authorized the Commission to negotiate with foreign governments in connection with any of the subjects described in Paragraphs (a)-(e) of Interrogatory No. 5. If the Commission has received such authorization, provide the following information:

(a) Describe the nature and extent of that authorization.

(b) State the date on which the authorization was received, and identify the agency and/or official who granted the authorization.

(c) Identify all documents which refer or relate to, or which constitute, the authorization.

ANSWER:

No such authorization has been received from the Department of State since none is necessary for the meetings the Commission has participated in.

The Commission's participation in the consultative process (to which the Department of State has never objected) is authorized by 47 U.S.C. § 151.

INTERROGATORY NO. 11

Identify separately for each response to the foregoing Interrogatories (a) each person consulted in preparing the response; (b) each other person known to the Commission who would have knowledge of the information which is the subject of the interrogatory (including, without limitation, persons not employed by or affiliated with the Commission) and (c) each document consulted in preparing the response.

ANSWER:

- (a) #1 Robert E. Gosse
- #2 Robert E. Gosse
- Willard Demory
- #3 Same
- #4 Same
- #5 Not applicable
- #6 John P. Greenspan
- #7 John P. Greenspan
- #8 Not applicable
- #9 John P. Greenspan
- #10 Keith H. Fagan
- John P. Greenspan

(b) Each attendee listed in response to Interrogatories 1 and 2 would presumably also have knowledge of information provided in response to the Interrogatories, although the extent and scope of their knowledge is not known by defendant.

(c) The only documents consulted in the preparation of responses to the interrogatories have been identified in response to the respective interrogatories to which they pertain.

The foregoing answers to these interrogatories are, to the best of my knowledge and belief, true and correct.

/s/ Willard J. Demory

Assistant Chief, International Common Carrier Bureau
Federal Communications Commission

Date: MAY 9, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK

: ss.:

COUNTY OF NEW YORK

GRANT S. LEWIS, being duly sworn, deposes and says:

1. I am a member of the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for plaintiff, ITT World Communications Inc. ("ITT Worldcom"), in this action. I submit this affidavit in support of ITT Worldcom's motion for summary judgment on its second and third claims for relief.

2. Plaintiff's second claim for relief relates to an October 12, 1979 Freedom of Information Act ("FOIA") request that was sent to the FCC. That request has not previously been filed with this Court. A true copy of the October 12 request is attached hereto as Exhibit A.

3. On April 14, 1980, in response to another FOIA request, the National Telecommunications Information and Administration of the U.S. Department of Commerce ("NTIA") released a report of the discussions held during a meeting in Ascot, England, on February 20-21, 1980 from which ITT Worldcom and other American carriers were excluded. A true copy of the NTIA report is attached hereto as Exhibit B.

4. On February 8, 1980, ITT Worldcom representatives attended a meeting of the FCC, openly recorded the meeting, and caused a transcript to be made. A true copy of the transcript is attached hereto as Exhibit C.

5. On April 22, 1980, ITT Worldcom representatives attended a meeting of the FCC, openly recorded the meeting, and caused a transcript to be made. A copy of the transcript is attached hereto as Exhibit D.

/s/ Grant S. Lewis

Dated: New York, New York
JULY 25, 1980.

[EXHIBIT A]

[reprinted at J.A. 20-21, *supra*]

[EXHIBIT B]

UNITED STATES DEPARTMENT OF COMMERCE

National Telecommunications and

Information Administration

Washington, D.C. 20230

MARCH 24, 1980

MEMORANDUM FOR: The Files

From: R. Ahern

Subject: Report of Informal Discussions,
February 20-21, 1980. Ascot,
England

On February 20th and 21st, I attended a meeting held in Ascot, England under the sponsorship of the CEPT for the purpose of discussing trans-Atlantic telecommunications. A list of participants at the meeting is attached.

The meeting came about after a series of telexes and other communications were exchanged between Chairman Ferris of the FCC and Chairman Larsson of the CLTA in the fall of 1979 and in the beginning of 1980. These communications were prompted by a request made by Chairman Ferris at the meeting held in Dublin in October 1979. At that meeting, Chairman Ferris sought and was granted a private meeting between the FCC and other U.S. Governmental agencies and Canada and CEPT for the purpose of discussing the introduction of new carriers and new services in the North Atlantic corridor. At that meeting, as at this Ascot meeting, no U.S. private communications carriers were present.

The summary record of the Ascot meeting, as it was finally adopted, is attached to this memo. The purpose of this memo is to describe in considerably more detail than is reflected in the summary record the events of the meeting.

The meeting began at 9:45 a.m. on February 20th. The representative of the BPO, Mr. Anthony Hawkins, welcomed us on behalf of the host administration. Chairman Larsson, the Chairman of CLTA and the Chairman of the meeting, then proceeded to add his welcome and to set forth what he considered to be the terms of reference for the meeting. He said first that the idea for these

discussions came from Chairman Ferris in Dublin. After that meeting, representatives raised the issue in the T Committee (which I believe is the Technical Committee) meeting of CEPT in November. The T Committee decided that additional information would be valuable and therefore Chairman Larsson agreed to this informal meeting. Chairman Larsson said that the idea behind the meeting is to have as much information as possible about areas of mutual interest. He emphasized that it was not within the terms of the meeting to make recommendations, take decisions or to change the situation. CEPT makes recommendations; however, administrations take decisions.

Chairman Larsson then went on to say that CEPT countries are interested in broad discussions of items of mutual interest, but standardization is very important. They do not consider that they have been very successful in the pulse code modulation (PCM) area. They believe that some coordination of standardization efforts would be in the best interests of all the world. For this reason, viewpoints on issues relating to standardization should be expressed. Therefore, there will be three main points discussed at the meeting: standardization, new services, and new carriers.

Chairman Ferris of the FCC then took the floor, expressed his thanks, and delivered an opening statement, the text of which is reproduced in the summary record.

Mr. Freeman of the State Department was asked to address the question of standardization. He very briefly identified four areas of concern for the United States and indicated that we were interested in strengthening our mutual efforts within the CCITT.

At this point, Chairman Delorme of Teleglobe Canada expressed his thanks to the BPO for arranging the meeting and, in a very short opening statement, indicated that Teleglobe Canada considered itself more in the nature of an observer than as a full participant in this meeting because the issues seemed primarily to relate to U.S.-CEPT relationships. Chairman Delorme nevertheless indicated Teleglobe Canada's great interest in the subject matter. He cautioned the group to take care because progress in this area will not occur overnight, and because the basic struc-

ture, as well as basic services, of international telecommunications must be protected. The intervention of Chairman Delorme signaled the coffee break.

The meeting resumed at 11 o'clock and the first item on the agenda became the question of harmonization. Monsieur Thabard of France began the discussion by saying that, from a European viewpoint, there is considerable concern about the issues relating to standardization and harmonization. Discussion of those issues is not intended to subvert the ITU or CEPT. Nevertheless, discussion is important because the issues are not only a matter of connecting networks but a matter as well of compatibility between customers. The situation has changed so that the danger now is of closed groups of users adopting standards and lessening competition. Mr. Ortoleva of Italy then took the floor on behalf of Mr. Gualardi, who is the Chairman of the Coordinating Committee within CEPT on standardization. He undertook to review the relationships between the United States and CEPT on this issue beginning in 1976 and concentrating on an exchange of correspondence held in that time frame with John O'Neill. It was clear that there was disappointment with the failure of the United States to follow through on Mr. O'Neill's initiatives concerning consultations on standardization issues. Mr. Ortoleva indicated that the CCH will meet at the CEPT plenary meeting in March, and that after March it may be useful to have a further meeting, at which time we could draw up a list of matters of mutual interest and continue discussions.

Chairman Larsson then sought the guidance of the meeting on whether the further meeting on standardization issues will be worthwhile. Mr. Freeman of the State Department indicated that he was aware of meetings taking place in 1976 between Mr. O'Neill and others and that it was true that some interest was expressed in having further meetings. But it is difficult within the United States to coordinate this subject because of the various diverse interests, not only within Government but also among carriers, manufacturers, users, etc. "We do not feel," said Mr. Freeman, "that there is a sufficiently focused U.S. position. However, if subsequent to March, CEPT were to furnish us

with specific topics for consultation, we would certainly consider the utility of further meetings." Chairman Ferris offered to provide FCC mechanisms for a formal proceeding with the Office of Chief Scientist.

In response to Mr. Freeman's suggestion that it would be valuable to compile a further list of topics for discussion, Mr. Ortoleva replied that there was not very much new. A clear notion of items for discussion comes from the existing list. Mr. Hawkins commented on Chairman Ferris' statement by saying that perhaps the ITU is the appropriate forum. He asked whether we could agree that standards for the Atlantic region are likely to give a lead for wider worlds and, perhaps if agreement could be reached between such countries and the United States, those agreements would form the lead for the ITU. Mr. Hawkins also remarked that, with regard to harmonization, there were difficulties because of the multiplicity of IRC's. Chairman Larsson indicated that we should have some current review of standardization and that the summary record should indicate agreement to do efficient work on this matter.

At 11:35 a.m., the second item on the agenda, that is a discussion of new services, was raised. Chairman Larsson introduced the topic by making clear that everyone in the room was interested in new services, principally because of market demand. In most cases, new services are introduced first in the United States, but not always. The United States should be interested in exchanging information, particularly on text communication services which have been introduced first in Europe. Chairman Larsson also stated that it was not generally economical to interconnect with a new carrier to initiate a new service, because of network planning. The principle is to use the existing networks. Chairman Larsson also stated that, as a rule, CEPT was not against new carriers. In fact, when it is economical, he said, they will introduce operations. Further they will introduce new services when there is demand, but almost always will use existing networks. Chairman Larsson, with apologies for going from the generalities to the specifics, described the situation with regard to Tymnet and Telenet. He said there is a demand for packet-switched services that

he sees, and, in fact, in Sweden they have bought a switch from a U.S. company. They have agreements with the IRC's to reach Tymnet and Telenet. It is not, however, economical to have a separate switch and have direct operations with either Tymnet or Telenet. It is economical to use the existing carriers. However, if traffic rose, direct circuits may be economical, but they are clearly not at this time.

Chairman Ferris intervened to say that he thought Chairman Larsson's remarks were helpful from the standpoint of making a distinction between new services and new carriers. He admitted that in the United States we tolerate a more Darwinian approach to carriers. He said that we are here to listen and learn what problems our policies present to the Europeans, and what factors of distribution there are. He spoke further about protecting the economic infrastructure, but within that need he saw the possibility to accommodate new services, utilizing more fully the existing infrastructure. He asked the Europeans if his view is correct. Chairman Larsson indicated that it was difficult to understand what was meant by new services. Does this mean certain very important customers use only a specific service, or is it special procedures, special data banks, special terminals, etc.?

At this point, Mr. Spasiano of Italy intervened, with what he said was the clear position of the Italian administration. In Italy, there are basically two kinds of services. The first are social services. The second are special business services. He said specifically that the Italian Administration is against resale of circuits because it is detrimental to their social service offerings. He further indicated that the Italian Administration participates in CEPT and CCITT. They give special priority to the United States because new services are born there. However, they want to continue discussions within the CEPT and CCITT frameworks. They are reluctant to transfer discussions to other forums when those discussions do not include the correspondents with which new services will have to be introduced. Mr. Spasiano concluded by emphasizing that he was speaking specifically on behalf of the Italian administration,

but that he was certain that other countries shared his views.

Mr. Thabard of France spoke in support of the statements made by Mr. Spasiano. He said France will encourage new services, but that does not imply new carriers when those carriers do not contribute anything new or when those carriers simply reuse circuits. He alluded to cream skimming and expressed concern about raising the costs of their social services. He said it was irresponsible of the French Administration to neglect their public responsibilities. He was specifically opposed to resale. He further cited a specific example, that they were not prepared to introduce direct packet-switching unless it could be found that there was some economic advantage.

Mr. Molina Negro of Spain said that he shared some of Chairman Ferris' ideas, but he also shared European views as well. He stressed the difficulties in Spain that would arise from increasing the number of carriers. When new carriers fail to offer new services, they wind up asking the Spanish administration to use old services at a higher rate. He stressed that we should be extremely careful about new carriers, in that they do not offer new services.

Mr. Wirz of Germany supported his colleagues statements and indicated that they have the same problem in Germany. He alluded to the cream skimming issue.

Mr. Hawkins of the BPO indicated that the BPO's postures on balancing social services and business services might be slightly different from other European administrations. However, the critical question was whether the introduction of new services means new costs and are those costs justified? He asked if Chairman Ferris could be more specific, since general statements were not adding very much.

Chairman Ferris said that the European statements had been very useful to him. He also commented on the issue of mandatory interconnection, since mandatory interconnection and unbundling will reduce the concerns regarding the introduction of new carriers and will enhance the competitive environment. He said that it was clear there is a definitional problem relating to a merger of carriers and services.

The problem of internal subsidies is not unique to Europe; it exists within the United States too.

We are moving to cost justification of each service, thereby making conscious judgments on the flow of subsidies. Chairman Ferris then said that if there was no dedication of specific facilities, costs are not changed. Therefore, this should not present a problem regarding internal subsidies. It presents no particular disruption of revenue flows. To require specific facilities, he understands, can affect particular revenue flows.

Chairman Ferris then mentioned the current challenge to the Authorized User Decisions and indicated that the issues surrounding COMSAT becoming a direct retail provider might have some effect upon internal subsidies. This is separate, however, said Chairman Ferris, from "value-added services" where no subsidies would occur. He asked whether his understanding was correct.

Chairman Larsson, in a very general statement, said that communications regarding value-added services would be valuable.

Mr. Hawkins of the BPO quickly intervened, saying that he was concerned that Chairman Ferris did not understand the position of the Europeans. He said new facilities are not just hanging around. It costs money to bring new circuits into use. It certainly costs extra for a service that may not be needed. He did not, therefore, accept Chairman Ferris' view of the issues.

Chairman Ferris indicated that he was attempting to segregate issues. He understood the necessity of cost benefit analyses, but wanted to know whether there was anything beyond those analyses which was required prior to the introduction of new services or carriers. Chairman Larsson said he understood a value-added carrier to be one that has a connection to a separate network, but that uses the existing network. He further said that if it is a good service, they were clearly interested.

Mr. Hawkins again intervened, saying that at the BPO they look to considerations of demand; specifically, could they be satisfied that they would not be using a failing service, not only in revenue terms but also in technical

terms? He raised the question of unemployment, and indicated that particular to the BPO is great concern over union problems.

Mr. Spasiano intervened to confirm his first statement that he is in favor of new services. However, in order to fully understand what new services are being contemplated and how, he needs examples. The distinction being made between value-added carriers and services and resale carriers and services were not clear. He gave two examples. In the first, someone leases the AVD from a carrier, establishes an Italian office, and "cuts that service in slices and gives it to others." The Italian Administration considers this third party use and does not accept it. The second example which he used related to a specific carrier, CCI. Someone uses the MTS network and makes a redistribution of normal telex messages. He does not accept this use either. He asked Chairman Ferris specifically to comment on which of the two examples he gave would be considered resale and which would be considered value-added.

Chairman Ferris said that, in his opinion, the second example is resale, the first is value-added. He then changed the topic to the recent authorization by the FCC to COMSAT for the provision of direct television service and asked "How does that decision sit with you?"

Mr. Hawkins indicated that examples regarding satellites would be developed after lunch. Mr. Delorme intervened to say that it was clear to him that it was necessary that we arrive at some form of common definition of what we mean by resale and value-added. The meeting then broke for lunch.

When the meeting resumed, Chairman Larsson gave the floor to Tony Hawkins of the BPO.

Mr. Hawkins, using the example of COMSAT's authorization for television service, described what the changes in the Authorized User Decision would mean for the BPO. He understood that the effect of bringing COMSAT into the marketplace would be to abolish rotational arrangements. The new arrangements may be more complicated. Broadcasters would come to the BPO. The BPO would have an uncertain understanding of with which carriers they should

deal. He said that there could be problems for the BPO in this regard, but indicated that he did not consider them to be particularly serious. In fact, the customer must learn to do more for himself in this case. The principle, said Mr. Hawkins, is that the FCC, of course, has the right to allow COMSAT to offer this service, but that each administration has the right not to be a correspondent. He said that, in the case of COMSAT, since it was a well known international telecommunications entity, there would probably be no problem. But in other cases, stability, that is the stability of the carrier at issue, might be a problem. There will be, of course, extra work relating to a settlements and operational agreement with COMSAT. That can be arranged. In sum, said Mr. Hawkins, we must retain our right to choose our correspondents based upon economic considerations, operational considerations, and the flow-throughs which we may get.

Chairman Ferris said that his understanding of Mr. Hawkins' intervention was that the sentiment regarding COMSAT is that "COMSAT passes the litmus test." Ferris asked whether the assessment is regarding the carrier and not the service? Mr. Hawkins indicated that Ferris' question widens the issue. He was not intending to say anything more than that COMSAT is a stable organization likely to exchange accounts regularly. Ferris indicated his question was regarding the concern of the BPO, that is, do they care about the overall network arrangements or only their own? Mr. Hawkins replied that the BPO is concerned both with revenue and customer satisfaction. Ferris asked whether the BPO goes behind a carrier's representations regarding quality of service. Mr. Hawkins then said that he did not want to be too specific, but if one of the four existing IRC's dropped out, the BPO would be delighted because the quality of service provided by that carrier was not sufficient. Chairman Ferris asked what factors exist to prevent the BPO's dropping that carrier. Mr. Hawkins indicated that, of course, their rotational arrangement had made that an impossibility. Chairman Ferris then spoke about mandatory interconnection and unbundling in what appeared to me

to be an irrelevant comment with regard to television service, although at this point the discussion was very confused.

Mr. Fogarty raised the overall issue of Authorized User and indicated that he expected that in April the Commission would revisit the issue and asked what ramifications would follow. Chairman Larsson asked what would be expected to happen when the Commission revisited the issue, what differences would there be. Chairman Ferris said that he did not know. He said the IRC's are offering services that are more than simply the overseas link, and that the intention would be to allow customers to make choices in their ways of approaching the problem. Mr. Fogarty intervened to say that if the Commission approves Authorized User, his belief is that the price of the overseas link will be driven close to cost. Service offerings to the customers will improve. The IRC's will each offer enhanced services.

Mr. Hawkins asked what services a revision in the Authorized User would encompass. Mr. Ferris answered leased services. Chairman Larsson was concerned that if the area was free for competition, carriers could presumably book more time than is possible to transmit. Chairman Ferris said that some coordination should exist.

Mr. Spasiano then intervened to make a general statement about new carriers. He indicated that ITALCABLE was the first correspondent in Europe to open service with TRT. He said that this opening of service with a new carrier is not a habit, but when they see it as an advantage, they do it. It is not a compulsory action; it is judged on a case-by-case basis. He then said that if the Commission's decision with regard to mandatory interconnection means that it is possible to connect with only one carrier and get all customers, the picture will change entirely. Chairman Ferris intervened at this point to indicate once again that he was not talking specifics.

Mr. Thabard of France asked whether the conversation might be getting unnecessarily obscure and brought the discussion back to T.V. He said that in the case of T.V. service, the problem with regard to COMSAT is very different than with other carriers. There is no problem if COMSAT is the only entity. He had, however, some reser-

vations when the discussion goes beyond television service. Planning becomes a problem. If COMSAT were allowed to offer services directly, there would be a distortion between cables and satellites. He said that there are, of course, merits to competition, but there are services where no competition exists. While they accept the U.S. position on competition, the U.S. must also realize that the Europeans are free to choose.

Chairman Ferris indicated that the concerns of Mr. Thabard were valid and that it was not beyond the realm of possibility that COMSAT might be permitted to buy cable circuits. Chairman Larsson closed the meeting for a coffee break by saying that COMSAT is certainly a special case and not particularly one that need be discussed at great length.

After the coffee break, Chairman Ferris tabled definitions of resale and value-added. Those definitions are included in the summary record.

Mr. Hawkins asked for specific examples. What role, for example, does the FCC see for CCI?

Mr. Verveer intervened to answer Mr. Hawkins' question. He indicated that the Commissioners would not address specific cases or carriers. He answered the question by saying that the Commission believes CCI falls into a "pure resale category," and that CCI perhaps should not fall into classical public utility regulation. The Commission, said Mr. Verveer, has committed itself to a study of the question of international resale.

Mr. Thabard indicated that the definitions submitted were useful, but they may twist words beyond meaning. For example, a value-added carrier may well exist in telephone services.

Mr. Spasiano intervened to ask whether it was possible to use Telenet as an example. Is Telenet a resale or a value-added carrier? Is it, in fact, a carrier?

Mr. Verveer said that, in his view, Telenet, Tymnet and Graphnet are all common carriers, and that the Commission thought of all three as value-added carriers. Mr. Verveer then drew the distinction between a conventional facilities-based common carrier, for example SBS or XTEN, and a

value-added carrier. He said that value-added comes into play when no ownership of facilities occurs.

Mr. Spasiano asked what the distinction was between carriers who must file a tariff and those who do not. Mr. Verveer replied that the reference was to the concept of sharing, that is communications users who act in bulk. He described the decisions relating from the domestic resale decision, which determined that a resale carrier would file a tariff, a sharer would not be required to be regulated.

Mr. Thabard asked whether his understanding was correct that whenever a carrier has access to the public, it's a common carrier. Then he asked what is the situation of a time-sharing company which offers other than data processing services.

Mr. Verveer said that the United States does have private carriers; generally private microwave facilities. Regarding the time-sharing issue, that involves the second computer inquiry and the FCC now has that under consideration.

Mr. Spasiano asked whether General Electric would be considered a common carrier, or in his words a "transmission carrier," and asked whether they have a tariff. Mr. Verveer replied that General Electric is not required to file a tariff.

Chairman Larsson asked whether General Electric operates with special circuits. Mr. Vree from The Netherlands replied that, in the case of The Netherlands, General Electric has 50 kilobit private line circuits.

Chairman Larsson described in general that the test which the European administrations used went primarily to economic benefits. When it is economical, they will introduce direct circuits with the carrier. But until there is sufficient traffic, it will not be economical.

Chairman Ferris said that each country will likely have its own test. Mr. Thabard said that Chairman Ferris was right. Mr. Thabard further said that while each nation is sovereign, and each nation will, of course, have its own test, the function of CEPT is consultation within the European community, and that Chairman Ferris should not feel

that the Europeans are not united. In fact, they are a united front.

Chairman Ferris replied that the Commission's intention was to join the united front, at least in terms of consultations.

Mr. Spasiano tabled a document showing circuit distribution within Europe. There were several interventions during which that document was corrected.

Chairman Larsson then asked the question whether it could be agreed that the general proposition that new carriers will be introduced when the economic situation warrants was acceptable. Mr. Thabard intervened to say that he thought it should be rephrased to include a double negative, that is, new carriers will not be introduced unless there is an economic reason to do so.

Chairman Ferris intervened to say, "Yes, but my understanding is that each country will face that decision on its own terms."

Chairman Larsson said that there was general acceptance of the Commission's interconnection decision, since they believe it would make it easier to introduce new services.

Mr. Spasiano said that, from his viewpoint, the best solution to the problem was to have only one correspondent. He added that they are obviously open minded and they talk to all carriers.

At this point, Chairman Delorme of Teleglobe intervened to seek clarification. He reviewed what he considered to be the two basic premises underlying the FCC's motivations. First, he said, is that the general objective is to encourage development of new services. The FCC has determined that the best way to do this is to liberalize conditions, that is to open the market up to competition. The second premise is, that due to the monopolistic characteristic of basic service, the regulatory agency tries to act like the marketplace. His point, he said, was to ask two questions. If there is a proliferation of carriers, the role of the FCC will presumably change. How will this take place? Secondly, under certain circumstances value-added carriers may provide service similar to common carriers, but at a lower

rate. The operating cost may be only one factor to be considered. The accounting rate is another one. What happens when a carrier negotiates a lower accounting rate with a monopolistic foreign correspondent? Can this happen?

Chairman Ferris responded to Mr. Delorme's questions. He said first that this issue goes to the heart of the basic FCC philosophy. Then he spent several minutes redescribing in very general terms that philosophy. When he returned to specifics, he admitted that he did not know what the mechanism is for the accounting rate, and therefore had some difficulty understanding the drift of Mr. Delorme's question.

Delorme then took the floor again and, without directly using the word "whipsawing," described a situation in which a value-added carrier, since it was presumably unregulated, would have greater freedom than a common carrier in negotiating accounting rates.

Chairman Ferris then replied that might happen, but he thought that the FCC would in some way retain jurisdiction over the question.

Mr. Spasiano and Mr. Mathews of Canada tried to clear up the question by reminding us that it depended to some extent upon the flows of the traffic between the two individual points as to who would win and who would lose. Ferris then responded that it had never been a problem that he was aware of, that it seemed a bit like a mosquito climbing up the leg of an elephant. Mr. Delorme ended the day by pointing out that in Canada they grew their elephants very small and their mosquitos very big, and therefore he remained concerned.

At 9:30 a.m. on February 21st, the meeting resumed for the purpose of agreeing upon summary records. Several drafts were proposed. Various wording changes were suggested. Finally, at approximately 11:30 a.m., agreement was reached on a summary record which is included as an attachment to this memo.

Chairman Larsson then raised the question of whether a future meeting of this group would be advantageous. Chairman Ferris indicated that he thought we all agreed upon the usefulness of this meeting, and he believed that a fu-

ture meeting would also be helpful. Perhaps, he said, we would continue after the July meeting sometime in the next year. Chairman Larsson indicated that he will report to the T-Committee that he believes that this meeting should not be combined with the facilities planning meetings or any other meeting, since the administrations might seek to send different people. It would be possible, if we wish to have another meeting, to set the date when we meet in July. The meeting adjourned at approximately 12 o'clock.

Attachment

H. Geller

E. Zimmerman

I. A. Staff

W. L. Fishman

F. Chisman

G. Skall

D. O'Neill

[EXHIBIT C]

[Transcript of February 8, 1980, FCC meeting]

Ferris: Communications Satellite Corporation, ITT World Communications Inc., AT&T, RCA Global, etc.

Applications for Authority to Provide Satellite Television Services Directly to Users at U.S. Earth Stations

To End the Rotational Arrangements for Overseas Television Service

Verveer: Mr. Chairman, Jane Mago will present this item. I'd like to note at the outset two editorial changes in it. The first is we would propose after consultations with the General Counsel's office to essentially delete the bulk of the discussion paragraphs 13-18 of the first of the attached items to make it quite clear that we are not resolving what should be regarded as tariff issues in a 214 application setting. The second editorial change was suggested by Commissioner Jones. It is in the second item at paragraph 13 having to do with verification of the interpretation of Section 222 of the Act. Commissioner Jones correctly pointed out that it's unnecessary for us to reach or to characterize that section. We would propose deleting the phrase that does characterize the Commission's present view of 222.

Lee: Before your explanation it might help you if I told you my problem. Seems to me we need to discuss one aspect of items 4 and 7 jointly, 7 being the Graphnet proposal. We hold in paragraphs 27 and 28 of item 4 that it is all right to allow Comsat to provide service without having its authorization conditioned on obtaining operating agreements, but in item 7 we continue to require that Graphnet obtain such operating agreements as a condition of its authorization as concerned with the-looks like-different method of treatment in the two items so you can address that issue.

Verveer: Commissioner I'll try to answer that right now. The item No. 7 involving Graphnet is essentially a follow-on to Commission action that has occurred some considerable time ago with an intervening judicial decision essentially instructing the Commission to put some sort of a time limit on the authorization that had been granted to

Graphnet. We have spent some time in the Bureau reflecting upon the nature of operating agreements and the requirement and whether or not this Commission should in each and every or perhaps in any circumstance require U.S. carriers to obtain operating agreements as a condition of authorization for service. And while we haven't come to any firm conclusion we could recommend to the Commission I think that Item 4, which does not make the obtaining of operating agreements a precondition, probably more closely reflects our view of what would be appropriate Commission policy than does the Graphnet Item No. 7 which as I say is essentially now a follow-on to something that had been set in motion some considerable time ago.

Lee: Was it your opinion that Items 4 and 7 are consistent in the treatment occasioned by the Court intervention?

Verveer: Yes. Commissioner, I think at this point I wouldn't want to say that there has in fact been a change of policy, because we try to point out in Item No. 4 there have been instances in the past in the Atlantic Ocean region where no operating agreements were required, essentially because its a blanket authorization one cannot really contemplate, one wouldn't want to contemplate requiring the carriers to obtain operating agreements with each and every entity, each and every country with which they may want to do an international television transmission business. And so what we are proposing here is quite consistent with something the Commission did eleven years ago. I believe it was eleven years ago in the Atlantic Ocean region; but, referring to the Graphnet situation I wouldn't want to say, I wouldn't want to be in a position . . . I'll back up and I'll start that sentence again. Were we writing on a completely clean slate with respect to the Graphnet application for international authorization, I am not sure today, Commissioner, that the Bureau would recommend to the Commission that it condition Graphnet's authorization on the obtaining of an operating agreement with one or any foreign entities.

Ferris: Was the purpose of that condition, Phil, to protect against potential marketing arrangement when you really didn't have the capacity without the landing rights al-

ready obtained and therefore we had to protect the potential users against a premature marketing of that service?

Verveer: I think, and we are trying to begin to discover the historical origins of these requirements for operating agreements, but I think that the Commission's interest in operating agreements stems more from a concern about settlement rates with foreign entities. That there is a bit of a fear because we have multiple carriers offering an international business and in general the foreign administrations have only a single carrier offering an international business. That our carriers would in essence bid up the price of settlements. That is our carriers would agree to less favorable settlement rates as they sought to conclude operating agreements with foreign administrations and that there be cash outflows; there would essentially be dollar outflows from the United States because our carriers would be retaining less than a 50% share, let us say, of the total monies that were being paid in for telecommunications services. I think that that is surely one of the reasons the Commission first became involved in this. Now it may not be the only reason. I have some suspicion in looking at this point not as deeply as I would like to, however, that the whole concept of operating agreements is one in which there has been an enormous gloss put through the years; that various entities in arguing against their competitors' offering of service have made of the obtaining of operating agreements more than maybe the Commission really would like them to be.

Lee: I guess the bottom line is, can Graphnet provide service without an operating agreement. Are they providing service now?

Mago: Commissioner we might point out that in the Graphnet decision the Court itself said that we should require an operating agreement because they felt that in that situation the service might not be available to the public if we allowed Graphnet to have an unconditional authorization. That at some point they would be preventing other carriers from offering that service to the public.

Lee: CCI has been operating without.

Verveer: Yes, Commissioner I think that may be really one of the keys as the technology is changing as the international communications environment is changing. It's quite clear that in some basic sense, in order to offer international service or to offer any kind of a communications service, one has to have some sort of operating agreement, some sort of an operating arrangement with someone at the other end of the circuitry, and where transmission facilities are owned, it's fairly clear that one has to interconnect with other kinds of transmission facilities or someone to carry on the traffic further on. But where we're talking about a resale business of the sort that CCI offers, it's not really at all clear that an operating agreement of the same nature as between AT&T, for instance in a foreign entity, is going to be required. In fact, on the contrary, it's quite clear that we really are beginning to deal with something quite different; and if we were to continue to require operating agreements for all entities, and in particular resale kinds of entities, that don't own underlying transmission facilities, we might in fact be making it possible by our own processes, our own legal requirements, we might be making it much more convenient for entities, wherever and whoever they may be, who are opposed to the idea of additional services or additional carriers to prevent the offering of service essentially by operation of communication regulation. The CCI situation I think is an excellent example. These folks were offering some sort of a service, apparently successfully, without any operating agreement in quite the same sense as an operating agreement between different telecommunications entities. And so, as I said, the Bureau is trying at this point to rethink the whole concept of operating agreements, and particularly to rethink whether or not it continues to be in the interest of the U.S. ratepayer for us to condition all of the international authorizations upon the obtaining of operating agreements. And, in fact, as we indicate in Item 4, there have been instances in the past in international television transmission, for instance, in the Atlantic Ocean region, where the Commission did not require operating agreements.

Ferris: Well we've screwed up your presentation far enough now. Why don't you go ahead and pick up?

Mago: The items before you are intended to implement the policy which the Commission adopted in Spanish International Network. There we said that the public interest would be served by allowing competition for international television services. In addition, we found that Comsat should be allowed to be a competitor in that market. Therefore, the first item before you, I-P-C-50, implements the authorization to Comsat. In that item, we give Comsat full authority to serve television customers directly. There was a good deal of discussion in that order about Comsat's proposed tariff which proposes to offer the service at the same rate to the customers as it does to the carriers. As Phil discussed earlier, we will defer for due process reasons, the final decision of that cost justifiability. The carriers also argued, however, that we have to consider that in terms of the competitive impact that it would have on the international television market. We have determined that any of the possible competitive impacts which may result as a part of our authorizing Comsat's direct service are likely to serve the public interest and therefore do not act as a bar to the grant of this authorization. In addition, in response to Commissioner Lee's point, we found that there is no need to have Comsat file operating agreements prior to the grant of this authorization, in that there is no question that Comsat will be able to offer this service, and there is no question that it would be barred to the public. Finally we've decided to . . .

Ferris: Why is it no question?

Mago: Because Comsat has been offering the service for some fourteen years through the carriers. Comsat in addition has operating relationships with foreign entities that they would be operating with here.

Ferris: Would Comsat be making the arrangements with the foreign countries with respect to the terrestrial length or would that be done . . .?

Mago: They may be doing that.

Ferris: They might be doing the arrangements for the terrestrial length?

Mago: Yes they can. Right now there is a service billing statement that goes to the foreign entities and there simply is another portion of that statement which has to be billed out in order to arrange the terrestrial links at the other end.

Ferris: So the terrestrial length of the United States would not be done by Comsat.

Mago: No it would not. It would be done by the individual customer.

Ferris: The user would make those arrangements?

Mago: Yes or another carrier.

Ferris: But from the length on the other end?

Mago: It may be either the customer himself who arranges those lengths or it can be done through Comsat.

Brown: I had a question on that, Mr. Chairman, too. This order, then what we've done here, and in our original Spanish International decision, extends Comsat's area of operation on the foreign side to permit it to arrange for the terrestrial side, the terrestrial portion.

Mago: It allows them to make that order. Yes it does.

Brown: Why?

Mago: Because that enables them to offer the service effectively to the customers should the customer choose that.

Brown: But we're not doing it here?

Mago: I'm sorry.

Brown: We're not permitting Comsat to engage in that activity.

Mago: In the U.S. No we're not.

Brown: Why the difference?

Mago: We had determined in the Spanish International Order that it would not be in the public interest for Comsat to have end-to-end service. We specifically stated in that order that they should not be permitted to offer the U.S. terrestrial portion.

Brown: Okay. But what we're saying is that they can handle one end of the service completely. Does that necessarily follow from Spanish International?

Mago: It has to do with Comsat's authorization for service within the United States, in that Comsat was designated in the 62 Act as the carriers' carrier; and so its serv-

ice within the United States, though we have said the television customers could be authorized users for Comsat services, we designated that as authorized use at the INTELSAT earth stations. In the Spanish International order we said that we felt it would go beyond that authorization.

Brown: I thought what we were doing was putting the networks in a position of direct users.

Mago: Yes we did.

Brown: Okay. Does a direct user, before this Ruling, use Comsat at the other end, or does the direct user make its own arrangements for the terrestrial portion?

Mago: Prior to this time the carriers made the arrangements at the foreign end. We were working under the rotational system of carrier-of-the-week and the carrier. . . .

Brown: My question doesn't go to international TV it goes to the general situation of a direct user that is one of the IRCs is a direct user. Does Comsat provide for its terrestrial portion on the far end?

Mago: No.

Brown: Why are we extending that here? I thought we were putting the TV networks in the same position as direct users, that is the IRCs. But in fact what we're doing is extending it at the foreign end. Why?

Mago: Because its a minor change in the situation, Commissioner.

Ferris: Would it be tariffed by Comsat? I mean would Comsat then have a part of their tariff a terrestrial link in the foreign country?

Mago: No, that's paid to the foreign government.

Ferris: But there is no add-on charge but they are actually making those arrangements for the terrestrial length in the foreign country?

Verveer: I hope someone here will correct if I am wrong about this but I think that essentially what Jane is saying is that Comsat would be in the same position as our IRCs or AT&T would be in terms of the offering of the television transmission service, and I think that they should be conceived of as to the foreign links as essentially just order

takers. I think they take the orders and pass them on to their foreign correspondents overseas. Is that correct?

Mago: Yes.

Ferris: But the assurance of any tariffing over and above the actual cost for that terrestrial link to be handled in any tariffing arrangements for this or going to be considered separately?

Verveer: Mr. Chairman, I think the charges as to the foreign link are essentially set by the foreign administration.

Ferris: And there will be no additional charge for Comsat to the user here in the United States for making that arrangement?

Mago: The statement that was in the order was that there would be no additional charge.

Ferris: There would be no additional charge.

Mago: And that the service that they would be performing here is a minor bookkeeping service to fill in one more portion of an order form.

Brown: Okay.

Mago: Therefore, after consideration of all of the arguments that have been raised in the context of the file I-P-C-50, we have determined the public interest would be served by the grant of that authority. The second item that is before you gives authority to the carriers to end the rotational service arrangement for international television service. We've ended this arrangement not only in the Atlantic basin, but also in the Pacific basin in the Carribean. Again, this is to encourage the competition which we determined was in the public interest in the Spanish International Network order. Accordingly, the Bureau believes that the adoption of both of these items will serve the public interest and implement the policies that we had adopted in the Spanish International Network.

Washburn: I think its an excellent pair of items and I suppose there is no point in asking why it took as long as it did.

Don't answer that.

Fogarty: What will the impact be do you think economically by the adoption of these items on the IRCs?

Mago: Commissioner, as we said in the item, we feel that there are two possible impacts. One would be that the IRCs would be unable to compete for the television customers for this service, in which case they would lose less than one percent of their international traffic. The other option, Commissioner, is that the IRCs may be able to add value to the basic service which Comsat offers in terms of offering monitoring services for the full end-to-end arrangement, in which case they would be able to compete for the service and remain in the market.

Brown: The item also indicates that this represents less than one percent or about one percent of the IRC traffic so it's not a matter of if it goes alternative one in terms of their losing the business, it's not a massive impact kind of situation.

Fogarty: I followed very closely the dialogue you had with Commissioner Brown and the Chairman. As I understand the present arrangement, the IRCs provide end-to-end service and tariff the entire service. Is that correct?

Mago: Yes.

Fogarty: Now under this provision of this order, Comsat would only tariff the land line connection here in the United States plus the overseas service, but would not tariff the foreign connection.

Mago: Technically, Commissioner, the international television circuits are sold in half circuits. Comsat effectively is providing to the carrier the space segment service up to the satellite. At that point, it comes from the satellite to the foreign earth station and then those terrestrial links are all by a set price by the foreign government. The arrangements are made by the carriers or by Comsat in this particular arrangement but there is no additional cost to the carrier or to Comsat.

Fogarty: How is that cost passed on to the network? The cost of the foreign half of the service? Is that billed directly?

Mago: There is different arrangements for that. Comsat proposed in theirs to follow the CCITT recommendation E330.

Fogarty: Which is what?

Mago: Which is a reciprocal billing arrangement in that they would collect from the American user the cost of the entire transmission and transmit to the foreign government their half of the cost. And the same would be done on the other side, that the foreign government would collect the entire cost and then transmit half to Comsat.

Ferris: I don't think, that the domestic terrestrial link is not going to be billed by Comsat.

Mago: No that would.

Ferris: That would be arranged by the networks themselves.

Fogarty: By some private line arrangement or whatever with AT&T or specialized carrier.

Ferris: It's just the space hop and then an add-on of just the out of pocket costs for the terrestrial links on the foreign end. That's what the networks would pay to Comsat who would forward it. The terrestrial domestically would be arranged by the user here.

Fogarty: I only had one other point. When we consider the GTE Telenet acquisition, I didn't realize that our attention was directed to how onerous the conditions were and whether or not we ought to relieve GTE of some of the burden that we originally proposed. However, I just found out yesterday in paragraph 49 of that order, we turned down GTE's request for an extension of their 214 for Telenet, in order to provide Telenet with the opportunity to bargain with the Europeans. If I'd known that, I would have objected to it, and I see that we are going to do the same thing in Item 7 today and I am going to object to that. I think the Court in that ITT Second Circuit case misinterpreted the act, frankly, because if we gave GTE Telenet or Graphnet perpetual 214 it wouldn't in any way inhibit some other carrier from coming in to offer that service. So I think we made a mistake in that order and I think the court misconstrued the act.

Verveer: Commissioner, I certainly am inclined to the view that you just stated that perhaps the Commission should not have conditioned the authorizations, and I think, although it was otherwise just an extraordinarily fine opinion, my suspicion is and I guess I defer to Nina for a better

description of it, my suspicion is that the Commission was a little bit I would quarrel with the Court on the economics of its opinion that is this thought that you have overhanging the market that these potential entrants and that others are going to be deterred from entry because of that. Because, all the Court really was describing, I think, is the conventional economic situation in this country where there are no legal entry barriers.

Fogarty: Well I don't recall that we ever discussed that paragraph 49 and if we did I'm sorry that I missed it. I think we should have extended the authority to GTE Telenet, and the Chairman well knows we are going to London in a couple of weeks to discuss with the European entities the question of allowing our value added carriers and specialized carriers to do business in Europe. And what I'm afraid of is that if we adopt this Item No. 7 today, and refuse to grant the extension of 214 it might be a signal to the European entities that we don't really mean business.

Verveer: Commissioner, there are two possibilities that I had intended to mention when we got to Item 7. One very important fact is that I think before the Telecommunications Committee goes to England for these discussions you will have an opportunity to pass upon a rather broader application which Graphnet has filed to offer the totality of its services on an international basis, and I think it's important ...

Ferris: Which would embrace this particular ...

Verveer: It would embrace the fax service and all their other services. And I think it's important, that obviously I wouldn't want to prejudge what decision the Commission will make when it considers that matter but I think it would be a mistake to interpret the Commission's action if it should follow our recommendation today as being any dramatic backing away from the Commission's commitment to the idea that essentially our rate payers are better served by as many services and carriers as possible being available in the marketplace.

Ferris: Rather than deciding 7 now and with the policy implications that have been raised and the questions about the whole conditional process, I was going to recommend to

the Commission that when 7 comes up that we grant an extension of two or three months in that case solely on the basis is we are disposing of the extension orders three or four days prior to the expiration of the original time and on the basis of we should have disposed of it, earlier grant at least an extension of that basis [*sic*]. I think it might satisfy the Court, too, from the standpoint of breathing somewhat down our neck with respect to what status is coming in Graphnet and if in that two or three month period, we take up something of a more generic nature dealing with these conditions, as I think it might solve all the policy implications that are raised by Commissioner Fogarty, and which you seem to agree with.

Fogarty: In those circumstances, I think that's the correct way to ...

Brown: I'm inclined in that direction.

Fogarty: But then we could invite GTE Telenet to file again. I'd like to dispose of them as a package.

Ferris: Would that be included in the ...? Certainly it would be.

Verveer: Commissioner, I suspect that depending upon your disposition of the broader applications for authority that Graphnet has filed that could constitute precedent and indeed an invitation to other carriers to do something similar.

Ferris: On the second part, Jane, the rotational arrangement dealing with in the Pacific basin, now does that mean that these carriers can have a blanket authorization to serve in the Pacific basin.

Mago: Yes, it does.

Ferris: It does. So there's a parallelism between it and the Atlantic basin. There is no country-by-country requirement.

Ferris: The question then is on the adoption of the attached orders implementing the policies discussed and contained therein making it consistent with the Spanish International Network decision with the ... All in favor say aye.

All: Aye.

Ferris: Opposed No. The ayes have it.

Fogarty: I'll concur with a statement.

Ferris: Next item is the Petition of Graphnet for reconsideration of the nine month time limit imposed for concluding operating agreements for authorized facsimile service between the United States and Points 11 Western European countries. This is the item that we already had the discussion on. I would propose on just the grounds that we're coming up to the expiration of the deadline, to extend it for at least a couple of months on that basis alone, and that would afford the opportunity to come up with that more generalized consideration of this too, Phil, without disposing of the policy implications that we discussed earlier in this item, but give us an opportunity, and Graphnet an opportunity not to have any implications drawn from the fact that they lost an authorization.

Verveer: Mr. Chairman, there are a couple of factors that I'd like to point out that may be important. The first is that there is a more generic application that will be before you within a couple of weeks that may resolve this question. The second is, as I understand it, early this year Graphnet did file a 214 application which included an operating agreement with the Phillipines telecommunications administration for all of its services to the Phillipines and beyond and the term "and beyond" is essentially a term of art that means in conjunction with other entities they will be free to serve the world. What I would suggest, Mr. Chairman, is if you feel that you'd like not to in any way cloud or color the issues, perhaps it would be appropriate to give me the authority to grant some sort of short extension on the nine month period, perhaps even shorter than the two months that you proposed, to give the Commission a chance to consider this larger application.

Ferris: That's equally as good. Why don't we then give Phil the authority then to grant a short extension consistent with the plans that we have coming up for a more general consideration. All in favor of that grant of delegated authority to the Chief of the Bureau say Aye.

All: Aye.

Ferris: Opposed No. The Aye's have it. So ordered.

Verveer: Excuse me, Mr. Chairman would that delegation also include the possibility of extending Telenet's authority notwithstanding the GTE Telenet decision.

Ferris: Yes.

Fogarty: That's fine.

Ferris: Okay.

[EXHIBIT D]

[Transcript of April 22, 1980, FCC Meeting]

Ferris: The next item is a petition by ITT World Communications Inc. for rulemaking, seeking adoption of rules to govern informal Commission contacts with foreign telecommunications entities. Rulemaking 3523.

Verveer: Mr. Chairman, Dave Bass is going to present this item and he was assisted very substantially in some of the drafting by Joe Ross and Ted Kramer of our Enforcement Division.

Ferris: Mr. Bass.

Mr. Bass: ITT's petition seeks the adoption of rules to govern the Commission's contacts with foreign governments and telecommunications entities. We do have some changes to make in the draft before you now both on our undertaking and at the suggestion of the General Counsel's Office to strike from this order and help it coordinate with the collateral court suit that ITT has filed in the District Court and to also set out more clearly the procedures that will be followed with regard to these conferences in the future.

Ferris: Mr. Bass, why don't you point the microphone at you. Howard in the back room goes crazy trying to pick you up and if you just point it towards you.

Mr. Bass: In general ITT challenges first the Commission's authority to engage in any contacts with foreign telecommunications entities, but alternatively they argue that if you do so engage, you must follow certain rules to prevent the possibilities of prejudgment and *ex parte* influence. The rulemaking they'd like to have the Commission undertake would determine such issues as what topics should be discussed, make some policy statements, to disclaim any intentions to negotiate with foreign entities and to adopt the governing rules which would apply to all such contacts. Specifically, the rules ITT would have the Commission follow would apply a notice and comment procedure before each conference with a foreign telecommunications entity, would also require that such meetings be open, on the record with input from interested parties either in written form or orally. Our draft order concludes that the Com-

mission has not negotiated with foreign telecommunications entities in these conferences, that the Communications Act not only permits but encourages this type of contact and that existing laws including the Commission's own *ex parte* rules already fully protect the rights of interested parties. The draft order would, therefore, deny the petition but would indicate as a matter of Commission discretion, the notice and reporting procedures the Commission would continue to follow with respect to all of these conferences.

Ferris: What are those procedures?

Mr. Bass: Well, they would involve notice beforehand of the meetings themselves with notice of the time and place of the conference, the persons expected to participate, some indication of the topics to be discussed at the session. The meetings themselves would generally be open unless the determination is made that circumstances warrant closure. Following every such session...

Ferris: The meetings could be open or closed?

Mr. Bass: They could. It would be within their discretion.

Ferris: The meeting would determine whether it be open or closed. Is that correct?

Mr. Bass: That's correct.

Lee: You're in effect granting ITT's petition, in part then, aren't you?

Bass: Well, we want to make it clear that the procedures that would be followed are a matter of discretion and not a requirement.

Ferris: Okay, it, it's a good item.

Washburn: I had that same feeling Mr. Lee just expressed, denying them on the one hand and then in the last paragraph gratuitously granting the petition, not completely, but you do spell it out pretty completely, and I think that it is complete enough so that it hamstring the Commission. It would be bound by this in the future and when you might not want to be. For instance, you say if a meeting is closed, we'll keep a verbatim transcript or at least detailed minutes. These documents would be subject to disclosure upon normal Freedom of Information rules.

Ferris: Well, I think that is going to be edited.

Washburn: Well, that obviously is going too far. When you're talking to people in a negotiating stance abroad you don't want to get in that posture or people won't talk to you for one thing. I would eliminate 28 completely or at the very least get rid of that language I just read.

Jones: Can I add 27 to the paragraphs that I think should be deleted.

Lee: And 15.

Washburn: What's 15?

Bruce: I should say that there is a pending challenge to the Commission's role in consultative discussions in Federal District Court and, of course, we have the ITT petition for rulemaking. I think the intention here is to make the process of discussion with foreign entities as open as possible. It's been the Commission's position that these discussions are not for the purpose of negotiating operating agreements or entering into explicit trade-offs with respect to one issue or another. Its extremely important in my mind to the viability of this procedure that it be clear to the fullest extent possible what the subjects of discussion are and what information is gathered and exchanged so that I think in terms of the Commission assuring that this is a viable mechanism to open a dialogue with the international carriers that we do take some steps voluntarily to make those procedures as open as possible. Now, I think that what the intent of the item is to give the Commission some leeway in circumstances where foreign entities might think it...

Lee: I think that that's alright, Bob, with respect to our participation and when you talk about keeping a detailed transcript, you're dictating what the foreign powers will do too and they just ain't gonna like that.

Ferris: There's no need for that verbatim transcript, or minutes of the meetings. What you have specified is exactly what has taken place in the past when there was a meeting that was open, there were observers. When there was a closed meeting, there was a synopsis very similar to the type of ex parte memorandum of the types of conversations that we had domestically that was made public, so that everyone knew exactly what took place after the fact.

There was a prebriefing and I think those should continue and we will. But the idea of having verbatim transcripts. Sometimes the parties from the other side probably wouldn't want to participate in that.

Lee: I realize what you are trying to do but when you recognize the origin of this whole process and I was a part of it (I think it was 1974 at a Maritime Conference) when the French went to great pains to talk to me and their concern was they wanted to meet the guys who made the decision. They just couldn't understand this business where they have a handshake with the carrier and they think everything is all set and we sort of undo it and all they wanted to do was meet really with the Commissioners. At the time they were explicit and said we don't want the rest of the government even. I came back and wrote a memorandum and out of that we couldn't of course throw the rest of the government out but this is the background of this thing. They just wanted informality, and I think by this formal requirement of a transcript you would destroy their incentive for continuing what seems to be a very good thing.

Bruce: I think the key is that to the extent possible that we develop an adequate record of the discussions and that may not always mean that it be a verbatim transcript. I think it has been the case in some of the consultative meetings on facilities that verbatim transcripts have been maintained and there may be some circumstances where that's useful or appropriate depending on the subject of the discussion. I think it is useful to be explicit that we intend to utilize procedural protections that are appropriate in different contexts.

Jones: My problem with it is certainly not ... I mean that's right I think we want to make as much of all of these meetings open and available to everyone as we can, but I am concerned with in 27 and 28, we tie our hands and that we have to do it and then there will be times when I think not only would it be undesirable as far as the foreign entities are concerned, but there may things that are said that indeed for a variety of reasons should not be made public;

and I think we should retain the discretion to be able to do that. This seems to give away too much.

Bruce: Well I think the intention of the item is that I think the key is that we use those procedural protections that are appropriate for the particular discussions that are being carried out and obviously if the subject of discussion might reach a pending application or a pending matter, it might be useful to develop a more complete record to include in that docket. So I think our only concern is that the Commission make clear its general intention to the maximum step possible make this process an open one and make it an accountable one. And because it is an extremely important mechanism for the Commission to explain these evolving policies in the international area to foreign entities so that they are hearing it directly and not simply reading about it.

Washburn: But if you spell this out, what you've just said, in too great a detail and say here's what we're going to do, verbatim transcripts or full minutes, you're going to destroy the value of the whole exercise. So its a trade-off with what you want to do from the legal aspect and the reality of having this process work.

Bruce: Well, Commissioner, I agree. I think there will be some circumstances where it isn't necessary or even appropriate to retain a verbatim transcript. There may be certain kinds of discussions ...

Washburn: This says there will be one, or very full minutes, and I think it ought to be out. In fact, I'd kick out the whole paragraph.

Bruce: Well I think we feel from the litigation and a public policy standpoint that it's very important that we ...

Fogarty: But, Bob, I tend to agree with both Commissioner Jones and Commissioner Washburn. The part of paragraph 28 which disturbed me is these documents would be subject to disclosure under normal Freedom of Information rules. That all seems to declare a policy of the Commission to surrender the documents. It may very well be that we have exceptions under the Freedom of Information by which we can retain those documents. I think 28 has to be

either eliminated or if you want it because of the litigation it has to be redone because I think it goes too far for me.

Bruce: Well, I agree with that. I think the key point is that we make the discretionary aspect of these measures should be made clear and there are circumstances . . .

Jones: When you say the discretionary, do you mean discretionary in each instance. That does not come across. I mean it sounds as though we now as a matter of discretion declare this to be our future policy in all cases. If what you're saying is, that if the circumstances of a particular meeting are such that we can make it public it will be our general policy to make as much public as we can. I got the impression that was a general policy.

Bruce: I think that you stated it.

Lee: It's as far as I would go, if the Commission felt they really had to go down this route, it seems to me that you are committing foreign administrations to something that they may not agree to. I wouldn't object to having this very subject on an agenda of one of these meetings to see what they would be willing to bargain.

Fogarty: We can't say to a foreign administration that everything you say in this room we are going to give to the press if they ask for it. You just can't do that. They won't talk with you after that.

Brown: I suspect that that becomes a foreign policy question, doesn't it, within the intendment of the document.

Bruce: No.

Brown: That was a serious question because I think part of our problem is that this is a very carefully drafted paragraph and it has a lot of escape clauses that aren't obvious.

Bruce: I think it needs to be more carefully qualified along the lines that Commissioner Jones has suggested, to indicate that different steps will be appropriate in different circumstances. And I think certainly to clarify the implication that verbatim transcripts are obligatory in all circumstances, or that all the documents necessarily are going to be disclosable generally to the public. I think the intent of the paragraph was to indicate a general concern to afford the maximum procedural safeguards that are appropriate.

Lee: I know what your problem is. I appreciate that. Maybe you'd want to say something about we'd have agreement with our foreign counterparts anytime we affected a procedure like this.

Bruce: I think there's been some language on this paragraph that the Bureau and our office has been working on that I think tries to ...

Washburn: Why do we have to address this here, Mr. Chairman. Why can't we get at it in some other context. Let's get rid of this item without addressing this matter at this point.

Bruce: Commissioner Washburn, I think it's probably useful that we deal with this petition at this time because of the pending litigation in the District Court.

Washburn: Well if that paragraph is in there as it stands I'm going to dissent.

Jones: I get the feeling from Mr. Bruce that maybe the thrust is going to be changed.

Bruce: I think there is a redraft of the language that has been worked out.

Washburn: Well then let's, Mr. Chairman, send this back and look at it another day.

Bruce: Commissioner, we have some litigation ...

Ferris: Why don't you redo this paragraph 28 and recirculate this.

Verveer: The paragraph is effectively redone. Our litigation people have worked with the Bureau and its just a matter of almost reading the language at this point ...

Fogarty: It makes it kind of tough on us, you know.

Bruce: Well we can if the thing has to wait ...

Ferris: Why don't we circulate it this afternoon. I think to a great extent its much to do about nothing. After the other three items today, there's not going to be much left to talk about at consultative meetings and so I don't think; I think we are making a big procedural harangue about something that, if those rulemakings that we put out are lawfully adopted I think an awful lot of the discussion is going to change. I think we can correct that and circulate it, particularly ...

Verveer: Mr. Chairman we'd be happy to do that. I'd like to add that I think Commissioner Brown's comment about paragraph 15 is well taken and we'll delete that as well.

Ferris: Alright.

Washburn: So this will come around the first thing in the morning.

Jones: Since we have used the expression many times of how the *ex parte* rework ...

Bruce: We were going to put it on. Basically, we're ready to bring it forth for discussion this week and we thought that the Commission was sufficiently burdened by the items that were scheduled for today and next week. It will be on the next meeting. It's ready to go.

Ferris: We'll expect that rework language to come around this afternoon or tomorrow morning.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

* * *

ITT Worldcom believes itself entitled to summary judgment on its Third Claim for Relief. It asks the Court to rely solely on the following statements of FCC representatives as to what they are doing, so there can be no suggestion that there is any material issue of fact as to whether the FCC is engaged in the "conduct or disposition of official agency business" when it meets with European administrations to discuss their dealings with new carriers:

1. *Decisions by the Full Commission.*

- A. "The Commission, along with other authorized governmental agencies, attends these conferences to share and exchange points of view regarding future international telecommunications planning. *The Commission must attend such conferences in order to discharge its non-delegable duty to authorize international wire and radio communications in the public interest* (See Titles II and III of the Communications Act of 1934, as amended, 47 U.S.C. Titles II and III and the Communications Satellite Act of 1962, 47 U.S.C. § 701-744) and to regulate 'interstate and foreign commerce in communications so as to make available ... to all the people of the United States a rapid, efficient ... world-wide wire and radio communications service with adequate facilities at reasonable charges ...' 47 U.S.C. § 151...."

In re ITT World Communications Inc. Request for Inspection of Records, FCC 80-78 15644, Order Denying Application for Review at 4-5 (emphasis added), attached to Defendant's Memorandum as Exhibit E.

- B. "[W]e have undertaken to have Commission representatives meet face-to-face with them [foreign governments] to discuss mutual present and future telecommunications needs and the policies which will best serve them . . . [T]he process may result in a cooperative telecommunications climate between the countries involved which should significantly enhance the prospect for foreign acceptance of previously authorized services and services that may be licensed in the future. To the extent that these informal discussions can advance our progress toward realization of statutory goals, they are a necessary and natural corollary of our international licensing authority."

In re Petition of ITT World Communications Inc., FCC 80-29 27296, Order Denying Petition, released May 2, 1980 at 9 (emphasis supplied), attached to Defendant's Memorandum as Exhibit A.

2. *Statements by FCC Commissioners.*

A. *Commissioner Fogarty:*

(i) "Now, I believe that the Commission, as I said, has already gone a long way toward meeting the requirements, needs and necessities, as our foreign correspondents see it.

And I would hope, that as we have deferred, in our recent decisions, to your needs, as you see them, that you would give us the "tit" for the "tat"; in order words, if you would recognize our competitive policies, and that your agreements would deal with our requirement for multiplicity of carriers in this competitive arena.

* * * * *

I think the Commission—I can speak for myself and, I'm sure, for the Chairman, and Mr. Lee, and for the other commissioners who are not present—we want to meet you half way but we do request, I think, that the quid pro quo would be that you recognize that we are trying

to promote competition in the United States, and that competition spreads abroad, and that you would meet our specialized common carriers, and that you would agree to deal directly with them.

Transcript of meeting held in Montreal, March 22, 1979, at 8-9 (emphasis supplied), attached to Defendant's Answer as Exhibit B.

(ii) "[T]he Chairman well knows *we are going to London in a couple of weeks to discuss with the European entities the question of allowing our value added carriers and specialized carriers to do business in Europe.* And what I'm afraid of is that if we adopt this Item No. 7 today, and refuse to grant the extension of 214 *it might be a signal to the European entities that we don't really mean business.*"

Transcript of FCC Open Meeting, February 8, 1980 at 9-10 (emphasis added), attached to Lewis Affidavit as Exhibit C.

B. Commissioner Washburn:

"When you're talking to people in a negotiating stance abroad you don't want to get in that posture or people won't talk to you for one thing.

C. Commissioner Lee:

"... [I]f the Commission felt they really had to go down this route, it seems to me that you are committing foreign administrations to something that they may not agree to. I wouldn't object to having this very subject on an agenda of one of these meetings to see what they would be willing to bargain."

Comments of Commissioners Washburn and Lee, Transcript of FCC meeting, April 22, 1980, at 2, 5 (emphasis added), attached to Lewis Affidavit as Exhibit D.

D. Chairman Ferris:

"I think the leverage that we presently have at the FCC lies in the authorization of facilities. We have these [European] entities sitting around a common table and they want very much for the FCC to listen to them and to be sympathetic to their authorization requests."

I think it would be very, very germane in those meetings to put on the agenda the notion that we have some little entities that don't want facilities, but they want to offer services.

I think comity is a two-way street. We give to European entities in our forum the same consideration from the standpoint of our decisionmaking as they give to us.

And when we have authorized a carrier, we would expect them to be sympathetic to giving that carrier some sort of correspondent relationship.

I think the present situation, although it is not tidy and not crisp, does lead to a very thorough analysis of the criteria which should be used for international planning facilities. And it does look toward what the rate payer is going to pay.

I think it gives us leverage in international planning that could bring a greater sense of urgency to our correspondents overseas so that they will give due consideration to the competitive environment... [we] have in the United States."

* * * * *

Senator Hollings. *"On the leverage of the FCC with these foreign entities, have you discussed this situation with any of the foreign entities?"*

Mr. Ferris. *It was raised in the Montreal meeting on the consultative process. The question of correspondent relations was actually discussed briefly at the meeting. And the very fact that it was raised, I think, makes the point very tellingly with respect to how the process works.*

Comments of FCC Chairman Ferris, Hearings before the Subcommittee on Communications, Senate Committee on Commerce, Science and Transportation, May 9, 1979 at 1578, 1586 (emphasis added).

3. Statements by FCC Staff.

A. Robert Bruce, FCC General Counsel:

"A very significant achievement would be to identify the different approaches being used by the different parties, to narrow differ-

ences, and to move toward consensus. It would be useful to identify and understand areas of disagreement as well as to reach agreement on common principles and approaches.

* * * * *

We recognize that there has been concern about seemingly unilateral decision-making by the United States in the area of facilities planning. An effective consultative process should ameliorate this concern. On the other hand, we are concerned about the difficulties involved in reaching agreement on the implementation of new overseas service arrangements. *The consultative process may provide a mechanism for increasing cooperation in this area.*

[T]he exact nature of a consultative process and its integration into the domestic procedures in the U.S. and elsewhere will require further detailed studies.

Telex of FCC General Counsel Robert Bruce, March 20, 1979, at 3-4, 9-11 (emphasis supplied), attached to Defendant's Answer as Exhibit A.

B. *Philip L. Verveer, Chief, Common Carrier Bureau*

By design, the [Dublin] meeting was attended solely by agency representatives of the United States and various foreign governments ... The documents were generated to aid the Commission in construction of future international policy and contain FCC staff recollection of statements or representations of policy of foreign sovereigns. It is imperative that the Commission be able to engage in the free flow of information between other agencies of the U.S. Government and foreign governments in order to set intelligent and workable international telecommunications policies. ...

* * * * *

[The closed meetings provide] a critical avenue by which the United States gains insight into the status of foreign governments' telecommunications policies and by which information on mutual vital

interests is exchanged ... *The entire purpose of having such meetings [is] to allow for a meaningful dialogue on matters of international scope...*

Letter of Philip L. Verveer, Chief, Common Carrier Bureau to Grant S. Lewis, dated November 16, 1979, denying, in part, ITT Worldcom's FOIA request, at 3, 4 (attached to Defendant's Memorandum as Exhibit C) (emphasis supplied)

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC. PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

[FILED JULY 28, 1980]

STATEMENT OF MATERIAL FACTS IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PUR-
SUANT TO LOCAL RULE 1-9(h)

Plaintiff, ITT Worldcom submits the following Statement of Facts In Support Of Its Motion For Summary Judgment on its Second and Third Claims for Relief, as required by Local Rule 1-9(h). The documents referred to in this statement are the following: Defendant's Answer and exhibits attached thereto ("Answer" and "Exhibits to Answer"); Affidavit of Grant S. Lewis and exhibits attached thereto ("Lewis Affidavit" and "Affidavit Exhibits"); Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss and Motion for Summary Judgment ("Plaintiff's Memorandum"); Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, Or, in the Alternative, For Summary Judgment ("Defendant's Memorandum").

Plaintiff contends that there are no material facts as to which there exists a genuine issue to be tried, and that the following facts establish that plaintiff is entitled to judgment in its favor as a matter of law on its second and third claims for relief:

Second Claim for Relief:

1. On October 12, 1979, ITT World Communications Inc. ("ITT Worldcom") submitted to the Federal Communications Commission ("FCC"), a Freedom of Information Act ("FOIA") request. A copy of ITT Worldcom's request is attached to the Lewis Affidavit as Exhibit A.

2. On November 16, 1979, the FCC responded to ITT Worldcom's request, denying, in part, access to the requested documents. A true copy of the letter denying ITT Worldcom's request is attached to Defendant's Memorandum as Exhibit C.

3. On December 17, 1979, ITT Worldcom filed an Application for Review of the FCC's Freedom of Information action. A copy of ITT Worldcom's Application for Review is attached to Defendant's Memorandum as Exhibit D. ITT Worldcom filed a supplement to its Application for Review on December 26, 1979. At the time that ITT Worldcom filed the complaint in this action, the FCC's time to make a determination on the Application for Review had expired and it had not done so.

4. On February 14, 1980, the FCC adopted an Order substantially denying ITT Worldcom's Application for Review. The text of the order was released on February 20, 1980. A true copy of the Memorandum Opinion and Order released by the FCC is attached to Defendant's Memorandum as Exhibit E.

Third Claim for Relief

1. In October, 1979, members of the FCC Telecommunications Committee and other FCC representatives met with representatives of European telecommunications administrations and carriers in Dublin, Ireland. ITT Worldcom and the other American international record carriers were excluded from this meeting, and no transcript was made available.

2. On February 20-21, 1980, the Telecommunications Committee of the FCC and other FCC representatives again conducted a closed and off-the-record meeting in Ascot, England with representatives of European administrations and carriers. ITT Worldcom and other American international record carriers were excluded from this meeting, and no transcript was made available.

3. The FCC contends that the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. Section 552b, does not apply to meetings such as occurred in Dublin and Ascot, and has made no effort to comply with its terms. Set forth at pp. 7-11 of Plaintiff's Memorandum are true copies of

statements made by the FCC and its representatives at, or with respect to, their meetings.

Dated: Washington, D.C. June 28, 1980

LEBOEUF, LAMB, LEIBY & MACRAE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S
STATEMENT OF MATERIAL FACTS**

Defendant, Federal Communications Commission, by its undersigned attorneys, hereby states that there are no material facts in dispute in this case. Without admitting the materiality of the factual assertions, defendant responds in opposition to the paragraphs of plaintiff's Statement of Material Facts as follows:

SECOND CLAIM FOR RELIEF

1. No objection.
2. No objection.
3. No objection except to aver that the characterization of the time for defendant's determination of the application for review is a legal conclusion not requiring a response.
4. No objection.

THIRD CLAIM FOR RELIEF

1. No objection.
2. No objection.
3. The assertions obtained in the first sentence are conclusions of law and not assertions of fact requiring a response. Defendant has no objection to the assertions contained in the second sentence.

RESPECTFULLY SUBMITTED,

ALICE DANIEL

*Assistant Attorney General
Civil Division*

CHARLES F. C. RUFF

United States Attorney

/s/

VINCENT M. GARVEY

/s/

SURELL BRADY

/s/

PENNY QUINN

Attorneys, Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-2230

OF COUNSEL:

ROBERT R. BRUCE

General Counsel

KEITH H. FAGAN

Acting Assistant General Counsel

JOHN P. GREENSPAN

Counsel

FEDERAL COMMUNICATIONS

COMMISSION

Washington, D.C. 20554

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION

AFFIDAVIT OF COMMISSIONER ROBERT E. LEE

1. I am one of the three members of the seven-member Federal Communications Commission who has participated in previous international "Consultative Process" conferences and am scheduled to attend the next conference set for October 30-31 in Madrid, Spain.

2. Although travelling in my official capacity, both I and my fellow Commissioners fully understood that attendance at such conferences was limited to participating in a dialogue on matters of mutual concern and explaining to other participants my personal view of the nature of recent United States activities regarding new services and carriers in the international telecommunications field.

3. At no time prior to, during, or after attendance at such conferences have I been authorized, nor did I believe myself or other attending Commissioners to be authorized to (1) jointly deliberate on any Commission business at such meetings, (2) take any action on behalf of the Commission at such meetings, (3) submit to the Commission joint recommendations based on my experiences or agree at such meetings with other Commissioners as to subsequent agency actions or deliberations, (4) make any preliminary or other decisions on behalf of the Commission at such meetings, (5) conduct any hearings at such meetings on behalf of the agency, (6) participate in any vote or other joint action with any attending Commissioner on matters arising at such meetings, (7) reach any agreement with any other party on matters arising at such discussions, (8) bind or attempt to bind any party attending such discussions to any particular view, (9) seek to have the participants in such conference agree to make any recommendations or take any

specific actions regarding any particular telecommunications policies, (10) commit myself to any action either at such discussions or in the future, or (11) take any other action inconsistent with my understanding that my participation in such conferences was wholly in furtherance of the broad, informal, and clarifying exposition and receipt of views on international telecommunications matters.

4. Finally, based on my personal experience of 27 years as an FCC Commissioner, cancellation of the upcoming meeting in Madrid, Spain will have a deleterious effect on a mutual understanding of international telecommunications concerns. And, because the European attendees are arms of their governments and—unlike the individual Commissioners—might be viewed as speaking with final authority for their countries, the Europeans have consistently indicated that with respect to certain international telecommunications issues, "Consultative Process" meetings should not be open to the public.

/s/

ROBERT E. LEE

[dated October 23, 1980]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2324

ITT WORLD COMMUNICATIONS, INC.
PLAINTIFF-APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANT-APPELLANT

I, Willard L. Demory being duly sworn depose and say:

1. I am Assistant Bureau Chief — International — Common Carrier Bureau, Federal Communications Commission. In that capacity, I oversee the Commission's participation in "Consultative Process" conferences with representatives of communications administrations in other countries. I organize and coordinate these meetings and have also overseen the Commission's efforts to expand the CP dialogue to include discussions of non-facilities communications issues. I attended the meetings in Madrid, Spain, on October 30-31, 1980.

2. The Madrid meetings were taped pursuant to the Court's order of October 24, 1980. The Commission had agreed to the taping requirement as part of its effort to secure a stay of the Court's earlier (October 17th) order, which required that the meetings be opened to the public.

3. There is no question that the requirement that these meetings be made public has inhibited and will continue to inhibit the FCC from maintaining a dialogue with foreign telecommunications administrations on matters of mutual interest. At the meeting in Madrid on October 30-31, the European participants expressed great concern about the U.S. court action and the fact that the meeting was being taped. They told us that they would be unable to engage in the kind of candid exchange of information and views regarding non-facilities topics which the FCC had contemplated, as long as the discussions were tape-recorded or open to the public. My impression was that some of the Europeans might not object to opening the meetings to certain of the private carriers. All seemed to object, however, to

opening the meetings to *all* the carriers or to the general public.

4. The Madrid meeting itself was far less useful than had been anticipated because it was being taped. The Europeans refrained from offering opinions about the U.S. pro-competitive policies which were to have been discussed, and confined themselves instead to listening to the U.S. statement of position. The sense of constraint at the meeting was in marked contrast to the much more vigorous discussion which had taken place at a similar meeting in Ascot, England, some months earlier (which I also attended).

5. The Europeans are anxious to resume the discussions if the informal nature of the sessions can be guaranteed. They are also willing to discuss the issues "formally"—i.e., publicly—but meetings of this type would be highly structured and would prevent a candid exchange of information and opinion. In "formal" meetings, the Europeans and Canadians could only advance the views approved by their administrations. When meetings are informal, we are more likely to receive candid opinions from technical people and businessmen which can give us a clearer understanding of interests and concerns. If the meetings are to be truly useful in providing a vigorous exchange of views, the Madrid meeting made it clear that they must be off the record.

6. The Court's order, and the European reaction to it, have discouraged us from doing anything further to encourage informal communications. But for the order, we would now be in the process of planning for future meetings with the Europeans on non-facilities issues. Indeed, if the order had not existed, we would have discussed future meeting dates with the European participants at the close of the Madrid sessions. We have not been able to plan other meetings, however—and there was no discussion of future meeting dates in Madrid—because of the uncertainties created by the ruling.

7. If the ruling stays in place for a year or more (which I understand is the length of time it would normally take for this case to be decided on appeal), the delay would create a loss of momentum that could halt the talks altogether. We initiated these discussions and it is only recently that the

European administrations have indicated an interest in exploring the issues with us. It is important that we be in a position now to follow up by scheduling more meetings.

8. Representatives of the European administrations with whom I have dealt value their ability to discuss telecommunications policy issues with FCC Commissioners and staff. The European bodies function as operating as well as policy-making bodies. While the FCC is not an operating body itself, the Commission does have expertise about operations problems. The Europeans appreciate the opportunity to communicate with us directly and prefer this to discussing technical communications matters through diplomatic channels. In my opinion, the District Court's order will limit this direct contact and will have a decidedly negative impact on our relations with foreign administrations.

9. The Commission also wishes to schedule exploratory talks with representatives from Japan, and Australia to discuss whether or not a consultative process should be established in the Pacific Region. Such talks had been planned for early December of 1980 but were cancelled, and we wish to be free to reschedule them within the near future. The existence of the District Court's order has interrupted our plans in this area, as well as our plans regarding the consultative dialogue already established in Europe. Accordingly, we need a stay of the order as soon as possible.

/s/

WILLARD L. DEMORY

[Dated February 13, 1981]

Supreme Court of the United States

No. 83-371

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS,

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed *October 31, 1983*.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted.

OCT 8 1983

ALEXANDER L. STEVENS

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,
Petitioners,
v.
ITT WORLD COMMUNICATIONS INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF RESPONDENT
ITT WORLD COMMUNICATIONS INC.
IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

GRANT S. LEWIS
*Counsel of Record for Respondent
ITT World Communications Inc.*
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:

JOHN S. KINZEY
MARY JO EYSTER
LEBOEUF, LAMB, LEIBY & MACRAE

—and—

HOWARD A. WHITE
SUSAN I. LITTMAN
ITT WORLD COMMUNICATIONS INC.
100 Plaza Drive
Secaucus, New Jersey 07096
(201) 330-5000

QUESTIONS PRESENTED

1. Should this Court issue a writ of certiorari to review the factual determination of the District Court, affirmed by the Court of Appeals, that the Federal Communications Commission ("FCC") was engaged in the joint conduct or disposition of "public business of the greatest import" when it sought to influence the policies of foreign telecommunications administrations, a determination which led both lower courts to conclude that the public could be excluded from the FCC's meetings with the foreign administrations only if the FCC complied with the requirements of the Government in the Sunshine Act, 5 U.S.C. § 552b?

2. Did the Court of Appeals err when it held that the FCC's *ultra vires* attempts to negotiate with the foreign administrations on behalf of respondent's competitors constituted final agency "action" which was subject to judicial review in the District Court, rather than a final agency "order" which was subject to review in the first instance in the Court of Appeals?

STATEMENT PURSUANT TO RULE 28.1

Respondent ITT World Communications Inc. is wholly owned, through an intervening subsidiary, by ITT Corporation ("ITT"). ITT or its subsidiaries also own more than twenty percent of the common stock of the following publicly-traded domestic corporations: Piper Jaffray, Inc. (25 percent) and Wheat First Securities, Inc. (25 percent).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 28.1	ii
TABLE OF AUTHORITIES	v
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction: The Court of Appeals' Holding Is Limited To The Highly Unusual Facts Of This Case	2
B. The Lower Courts Found That The FCC At- tempted To Apply "Leverage" And Was In A "Negotiating Stance" During Its Closed Meetings With Foreign Telecommunications Administra- tions	3
C. The Proceedings Before The FCC, The District Court And The Court Of Appeals Led The Court Of Appeals To Conclude That The FCC Was In Fact Conducting Official Business When It Met With The Foreign Administrations	8
1. The Rulemaking Petition Before The FCC....	8
2. The District Court Action	9
3. The Court of Appeals' Decision.....	12
D. Postscript: Contrary To The FCC's Representa- tions To This Court, The Decisions Of The Lower Courts Have Not Halted The Consultative Process	13

	PAGE
REASONS FOR DENYING THE PETITION	16
I. The Court Of Appeals Properly Applied The Provisions Of The Government In The Sunshine Act To The Unusual Facts Of This Case.....	16
A. The Court Of Appeals Properly Held That The Telecommunications Committee Was "Authorized" To Act On Behalf Of The FCC At The Closed Meetings With Foreign Administrations.....	18
B. The Court Of Appeals Properly Held That The Telecommunications Committee Was Engaged In The Joint Conduct Of Official Agency Business During The Closed Meetings	20
C. Because The Court of Appeals' Decision Is Based On A Highly Unusual Set Of Facts, Review By This Court Is Not Warranted.....	23
II. The Court Of Appeals Properly Held That The District Court, Rather Than The Court Of Appeals, Should Adjudicate ITT Worldcom's Claim That The FCC Engaged In <i>Ultra Vires</i> Conduct During Its Closed Meetings With The Foreign Administrations	25
CONCLUSION.....	28

TABLE OF AUTHORITIES

A. Cases	PAGE
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967) ..	25
<i>Berenyi v. Immigration Director</i> , 385 U.S. 630 (1967) ..	17
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977).....	25
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971)	25
<i>City of Rochester v. Bond</i> , 195 U.S. App. D.C. 345, 603 F.2d 927 (1979)	25
<i>Columbia Broadcasting System, Inc. v. United States</i> , 316 U.S. 407 (1942)	25
<i>Graver Mfg. Co. v. Linde Co.</i> , 336 U.S. 271 (1949) ...	17
<i>Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Region Telecommunications Needs During the 1981-1995 Period</i> , FCC 81-243, 46 F.R. 31286 (June 15, 1981).....	14n
<i>ITT World Communications Inc. v. FCC</i> , 635 F.2d 32 (2d Cir. 1980).....	12n
<i>ITT World Communications, Inc. v. FCC</i> , 595 F.2d 897 (2d Cir. 1979).....	5, 23n
<i>Policies for Overseas Common Carrier Facilities</i> , 73 F.C.C. 2d 193 (1975)	4
<i>Rice v. Sioux City Cemetery</i> , 349 U.S. 70 (1955).....	24
B. Statutes, Rules and Regulations	
Administrative Procedure Act	
5 U.S.C. § 704	1, 25
Communications Act of 1934, as amended	
47 U.S.C. § 151 <i>et seq.</i>	3

	PAGE
47 U.S.C. § 155 (d)(1)	19
47 U.S.C. § 214	4, 23
47 U.S.C. § 222	15n
47 U.S.C. § 405	25
Federal Rules of Civil Procedure	
F.R.C.P. 37.....	17n
Freedom of Information Act	
5 U.S.C. § 552	10
5 U.S.C. § 552(b)(5).....	11
Government in the Sunshine Act	
5 U.S.C. § 552b	i
5 U.S.C. § 552b(a)(1).....	18
5 U.S.C. § 552b(c)(9)(B)	24
5 U.S.C. § 552b(h)(2).....	11, 18
Regulations of the Federal Communications Commission	
47 C.F.R. § 0.215	4, 20
C. Legislative Material	
Hearings on S.271, Serial No. 97-5, 97th Cong., 1st Sess. (Feb. 18, 1981).....	14
H. Rep. No. 94-880, 94th Cong., 2d Sess. (1976)	19-22
S. Rep. No. 94-354, 94th Cong., 1st Sess. (1975).....	19-22
D. Other Materials	
<i>Telecommunications Reports</i> , Vol. 47, No. 8 (February 20, 1981).....	13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-371

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,
Petitioners,
v.

ITT WORLD COMMUNICATIONS INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF RESPONDENT
ITT WORLD COMMUNICATIONS INC.
IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

Respondent ITT World Communications Inc. ("ITT World-com") submits this brief in opposition to the petition for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited in the FCC's petition, this case involves Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, which provides in pertinent part:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .

STATEMENT OF THE CASE

A. Introduction: The Court Of Appeals' Holding Is Limited To The Highly Unusual Facts Of This Case.

This controversy arose because the FCC ventured beyond its proper role as a regulatory agency and sought to influence the policies of foreign governments' telecommunications administrations. When it became enmeshed in foreign policy questions which are more properly the concern of the State Department, the FCC ran afoul of numerous provisions of the Communications Act, the Administrative Procedure Act, and the Government in the Sunshine Act.

The FCC seeks a writ of certiorari to review the way in which the Court of Appeals decided two of the many issues which were presented below. These issues are (1) whether the FCC's meetings with the foreign administrations are subject to the provisions of the Government in the Sunshine Act and (2) whether the District Court or the Court of Appeals had original jurisdiction to adjudicate ITT Worldcom's claim that the FCC was engaged in *ultra vires* conduct when it met with the foreign administrations. It must be emphasized preliminarily that these issues are raised in a highly unusual factual setting, and that the way in which the Court of Appeals decided them turned on the unique facts of this case. This is not a case in which the Court of Appeals considered the applicability of the Government in the Sunshine Act to garden variety administrative activities, or established jurisdictional rules for the judicial review of routine administrative decisions. Nor is this a case, as the FCC's petition seeks to characterize it, in which the FCC has done nothing more than informally exchange information with foreign governmental agencies. Rather, the Court of Appeals expressly held that the FCC was *not* merely exchanging information informally, and affirmed the District Court's factual findings that the FCC's closed meetings with the foreign administrations were "prearranged

conferences held to effectuate public business of the greatest import . . ." 43a, 699 F.2d at 1244.¹

The Court of Appeals' opinion will be of precedential value only in the rare future case in which a court finds, as District Court and the Court of Appeals found in this case, that an administrative agency has improperly involved itself in substantive negotiations with foreign agencies. Because the Court of Appeals' decision will have no effect on the day-to-day functioning of administrative agencies and because the facts of this case are *sui generis*, the Court of Appeals' decision does not warrant this Court's review.

B. The Lower Courts Found That The FCC Attempted To Apply "Leverage" And Was In A "Negotiating Stance" During Its Closed Meetings With Foreign Telecommunications Administrations.

ITT Worldcom provides international telecommunications services and is regulated as a common carrier by the FCC pursuant to Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* To provide international services to its customers, ITT Worldcom has entered into arrangements, known as "operating agreements," with a number of the "foreign administrations" which own and operate the telecommunications networks in other nations. These foreign administrations are generally governmental agencies which enjoy a monopoly of telecommunications services within their respective countries.

Although the FCC has authority under the Communications Act to regulate the rates and practices of ITT Worldcom and other American carriers which provide international telecommunications services, it has no jurisdiction over the foreign governments' telecommunications administrations. The FCC does, however, have the ability to influence the foreign ad-

¹ Citations herein to the Court of Appeals' decision, *ITT World Communications Inc. v. FCC*, 699 F.2d 1219 (D.C. Cir. 1983), are to the appropriate page of Appendix A to the FCC Petition, followed by a citation to the Federal Reporter.

ministrations indirectly because under Section 214 of the Communications Act, 47 U.S.C. § 214, the FCC has the power to approve or disapprove the American carriers' applications for the construction of new overseas communications facilities, which are typically built jointly by the American carriers and the foreign administrations.²

For a number of years, the FCC, the American carriers and the foreign administrations have participated in a series of meetings, known as the "consultative process," that the FCC has described as "an ongoing process of exchange of information . . . which would lead to the formulation of . . . traffic forecasts, data bases and analytical aspects of facilities planning." *Policies for Overseas Common Carrier Facilities*, 73 F.C.C.2d 193, 195 (1975). The FCC has been represented at these meetings by the three commissioners who are members of its Telecommunications Committee, and who in that capacity have been delegated authority to rule on applications pursuant to Section 214 for permission to construct new international communications facilities. 47 C.F.R. § 0.215. Until the events which led to this litigation, the consultative process meetings were conducted openly, and interested American carriers, including ITT Worldcom, were free to attend and participate.

In 1977, the FCC authorized two domestic carriers, GTE Telenet Communications Corp. ("GTE") and Graphnet Systems, Inc. ("Graphnet") to provide certain international communications services. In a departure from its prior practice, the FCC granted GTE and Graphnet authority to provide international services even though neither carrier had negotiated the operating agreements with foreign administrations which would be necessary to provide those services. On appeal, the

² When this controversy arose, the principal American carriers which competed to provide international "record," or non-voice, communications services were ITT Worldcom, RCA Global Communications, Inc., Western Union International, Inc., and TRT Telecommunications Corp. These carriers are generally known as international record carriers, or "IRCs." American Telephone & Telegraph Co. is the dominant carrier of international "voice" communications.

Court of Appeals for the Second Circuit held that the FCC erred "in granting [GTE and Graphnet] perpetual authorizations irrespective of how long the consummation of necessary agreements with foreign communications administrations may take." *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 903 (2d Cir. 1979). The Second Circuit therefore remanded with instructions to the FCC to limit its authorizations of the two new carriers by providing that their authorizations would terminate unless GTE and Graphnet succeeded in negotiating satisfactory operating agreements within a reasonable period of time.³

GTE and Graphnet were not immediately successful in obtaining operating agreements from the foreign administrations, which apparently do not share the FCC's policy preference for a multiplicity of international carriers. The Court of Appeals found that "[i]n response, the Commission in 1979 turned to the consultative process as a forum for encouraging foreign cooperation with the newly authorized carriers," 5a, 699 F.2d at 1225, and attempted to use the consultative process "as the vehicle to assist Graphnet and [GTE] in obtaining interconnection agreements." 39a, 699 F.2d at 1242. To accomplish this objective, the FCC, for the first time, insisted on excluding the American carriers from its meetings with the foreign administrations:

³ The Second Circuit also found merit in ITT Worldcom's appellate argument that the FCC had given GTE and Graphnet an unfair competitive advantage over ITT Worldcom and the other IRCs because the FCC authorized GTE and Graphnet to provide international services without subjecting them to the significant restrictions on their domestic activities which the FCC had traditionally placed on the IRCs. The Second Circuit, observing that the FCC then had pending before it the IRCs' requests for expanded domestic operating authority, required the FCC to place a condition on its authorizations of GTE and Graphnet which would permit the FCC to modify those authorizations to the extent necessary to correct any competitive imbalance which remained after the FCC had determined the proper scope of the IRCs' domestic operations. 595 F.2d at 910.

At the October, 1979 [consultative process] meeting in Dublin, Ireland . . . the [FCC's] Telecommunications Committee persuaded its foreign counterparts to expand the meeting's focus to "include the United States' authorization of new telecommunications services and carriers," and to exclude representatives of American carriers from this part of the meeting. In addition to the Dublin meeting, a February, 1980 meeting in Ascot, England and an October, 1980 meeting in Madrid, Spain were closed during discussions of this topic.

5a-6a, 699 F.2d at 1225 (footnote omitted).

As the Court of Appeals observed, "[t]he specific nature of these off-the-record discussions is sharply contested and cuts to the heart of these appeals." 6a, 699 F.2d at 1225. The FCC has conceded that "international negotiation is the province of the State Department," *id.*, and its attorneys have consistently sought to characterize the closed meetings as nothing more than informal exchanges of information and views, no different from the exchanges that occur at consultative process meetings. The FCC, however, never explained why if this were so, it found it necessary to close these meetings, rather than following the open meeting format traditionally used in the consultative process. Further, statements made publicly by the FCC's commissioners and staff, when uncensored by counsel, enabled ITT Worldcom to prove that something far more significant was occurring at the closed meetings. More specifically, it appeared from these statements that the FCC was, despite its protestations to the contrary, negotiating with the foreign administrations by "advis[ing] the foreign administrations of a linkage between their cooperation with the newly authorized American carriers and the Commission's receptivity to their needs in other areas," such as the authorization of new overseas facilities. 7a, 699 F.2d at 1226.

For example, Charles Ferris, who was then Chairman of the FCC, testified at a Congressional hearing that the Telecommunications Committee "seeks to apply 'leverage' at the

[closed] meetings to 'bring a greater sense of urgency to our correspondents overseas so that they will give due consideration to the competitive environment . . . [we] have in the United States.' " 7a-8a, 699 F.2d at 1226, n. 26. Similarly, Commissioner Fogarty stated during a speech in Montreal that because the FCC had accommodated the European administrations by authorizing a new transatlantic communications cable, known by the acronym "TAT," "the FCC expects a 'tit' for the 'Tat' and a '*quid pro quo*.'" *Id.* A third commissioner, Commissioner Washburn, conceded in an open FCC meeting that the Telecommunications Committee was "talking to people in a negotiating stance abroad." *Id.* After reviewing statements such as these, the Court of Appeals concluded that "there is considerable evidence that would appear to contradict the Commission's characterization of the discussions as mere unofficial 'information exchanges.'" 7a, 699 F.2d at 1225. The Court of Appeals went on to describe the substantive significance of the closed meetings in the following terms:

Commission representatives have described the closed exchanges as a "mechanism to narrow differences and to move toward consensus on common principles and approaches;" the Commission acknowledges that such consensus is designed to "lead ultimately to operating agreements for ITT's competitors."

* * *

The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members, but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the communications industry. They are in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."

7a, 43a, 699 F.2d at 1226, 1244 (footnote omitted).

C. The Proceedings Before The FCC, The District Court And The Court Of Appeals Led The Court Of Appeals To Conclude That The FCC Was In Fact Conducting Official Business When It Met With The Foreign Administrations.

The FCC's effort to encourage or coerce the foreign administrations to favor ITT Worldcom's competitors was obviously a cause for concern to ITT Worldcom because the foreign administrations, unlike the FCC, did not have a policy favoring competition, and therefore any action by the FCC which forced the foreign administrations to deal with GTE or Graphnet might make them less willing to continue existing operating agreements with ITT Worldcom, or to give ITT Worldcom new operating agreements for services which ITT Worldcom wished to introduce in the future.

1. The Rulemaking Petition Before The FCC.

On October 29, 1979, ITT Worldcom filed a petition for administrative rulemaking with the FCC. This petition did not seek any form of relief from the closed meetings which had already occurred, nor did ITT Worldcom seek a determination of the legality of the FCC's past conduct. Instead, ITT Worldcom sought prospective relief to prevent the FCC from abusing the consultative process in the future, and its petition was thus addressed largely to the FCC's discretion. ITT Worldcom requested, *inter alia*, that the FCC adopt regulations which would delineate the authority of the commissioners and staff who met with the foreign administrations, and clearly indicate that they had no power to negotiate or bind the FCC. ITT Worldcom also asked that the FCC adopt procedural rules for the meetings which would provide that the meetings would ordinarily be open, and that interested parties would receive notice of the meetings, and an opportunity to comment on the subjects which the FCC proposed to discuss with the foreign administrations.

The FCC took no action on ITT Worldcom's rulemaking petition until after ITT Worldcom had brought suit in the District Court. The FCC then denied the petition and, as the

Court of Appeals observed, "there is evidence suggesting that the rulemaking denial was crafted in part to enhance the Commission's litigation posture in the district court action." 50a, 699 F.2d at 1247-48.⁴ In addition to denying ITT Worldcom's petition for prospective relief, the FCC gratuitously volunteered a lengthy self-serving denial that it had acted improperly in the closed meetings it had already held with the foreign administrations. The FCC subsequently cited this portion of the rulemaking denial to bolster its argument that the legality of its actions at those meetings could be adequately reviewed by the Court of Appeals on direct appeal.

With respect to the specific procedures which ITT Worldcom recommended the FCC follow at its meetings with the foreign administrations, the FCC purported to find merit in most of ITT Worldcom's suggestions, including its proposal that the meetings ordinarily be open. However, it stated that it would follow these procedures as a matter of discretion, without adopting any binding rules, and the FCC "expressly reserve[d] the right to depart from [these procedures] where necessary. . . ." 11a, 699 F.2d at 1228.⁵

2. The District Court Action.

ITT Worldcom filed suit in the United States District Court for the District of Columbia on February 12, 1980. As its first claim for relief, ITT Worldcom sought judicial review of what

4 The evidence to which the Court of Appeals referred consists of statements by the FCC's general counsel and staff at the meeting at which the FCC denied ITT Worldcom's rulemaking petition. General Counsel Bruce advised the FCC that it should "deal with this petition at this time because of the pending litigation in the District Court," and an FCC staff member told the commissioners that the draft order which had been circulated would be changed to "help it coordinate with the collateral court suit that ITT has filed in the District Court. . . ." 50a, 699 F.2d at 1248, n. 202.

5 Despite the FCC's protestations that it would ordinarily follow these procedures, in actual fact it simply ignored them when it next met with the foreign administrations.

had actually transpired at the Telecommunications Committee's closed meetings with the foreign administrations, and a determination that the FCC had in fact engaged in *ultra vires* attempts to negotiate with those foreign governmental entities on behalf of ITT Worldcom's competitors. In contrast to the discretionary relief which ITT Worldcom had sought from the FCC in its rulemaking petition, ITT Worldcom's complaint in the District Court prayed for an injunction which would permanently enjoin the FCC from continuing its *ultra vires* misconduct. ITT Worldcom's complaint also sought an order requiring the FCC to comply with the Government in the Sunshine Act when it met with the foreign administrations, and asked the District Court to direct the FCC to release certain documents related to the closed meetings which the FCC had refused to produce in response to a request ITT Worldcom had made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

The District Court's disposition of ITT Worldcom's lawsuit was made on cross-motions for summary judgment. Pursuant to a local court rule, ITT Worldcom submitted a statement of the facts it contended were not in dispute on its motion for summary judgment on its Government in the Sunshine Act claim. As part of this statement, ITT Worldcom put before the District Court what ITT Worldcom asserted were true reports and transcripts of the concessions made by the FCC's commissioners and staff that the Telecommunications Committee was applying "leverage" and "in a negotiating stance" when it met with the foreign administrations. See pp. 6-7, above. In its response to ITT Worldcom's statement, the FCC agreed that the facts were not in dispute, and admitted that its representatives had made the statements which ITT Worldcom quoted. The FCC submitted no affidavit or other evidence to describe what it claimed occurred at the closed meetings with the foreign administrations. Its principal defense to ITT Worldcom's claim was a legal argument that the Act could not apply to the closed meetings because the Telecommunications Committee which represented the FCC at these meetings constituted less than a quorum of the full FCC.

While the FCC did not submit any evidentiary opposition to ITT Worldcom's motion for summary judgment on its Government in the Sunshine Act claim, the FCC's legal memoranda nonetheless "engaged in much obfuscation about the substance of [its] discussions" at the closed meetings. 29a, 699 F.2d at 1237. Much of the confusion in the FCC's papers undoubtedly resulted from the FCC's inability to give a consistent description of what occurred at the meetings without compromising its legal position on one or more of the claims which ITT Worldcom had made against it. For example, in opposition to ITT Worldcom's Government in the Sunshine Act claim, the FCC continued to argue that the closed meetings were only "informal" information exchanges at which no deliberations occurred and no official business was conducted. However, in opposing ITT Worldcom's attempt to compel the disclosure of documents under FOIA, the FCC took the position that background memoranda prepared for the Telecommunications Committee's use before the closed meetings were "predecisional," and therefore exempted from disclosure by the "deliberative process" privilege of FOIA, 5 U.S.C. § 552(b)(5).

Having before it ITT Worldcom's un rebutted evidence that the Telecommunications Committee was engaged in substantive discussions with the foreign administrations, and faced with the FCC's inability to give a coherent account of the closed meetings even in its unsworn papers, the District Court held that the FCC had failed to meet its burden under the Government in the Sunshine Act to demonstrate that the Telecommunications Committee was not conducting official agency business on the FCC's behalf when it met with the foreign administrations. See 5 U.S.C. § 552b(h)(2).⁶ The District Court also directed the FCC to disclose the documents which ITT Worldcom sought under FOIA. Finally, the District Court dismissed ITT Worldcom's claim based on allegations of *ultra vires* conduct, on grounds of ripeness and standing which

⁶ This section of the Government in the Sunshine Act gives the district courts jurisdiction to enforce the Act and provides that in any such action "[t]he burden is on the defendant to sustain his action."

were rejected by the Court of Appeals and which are not raised by the FCC's petition for a writ of certiorari.

3. The Court of Appeals' Decision.

ITT Worldcom's petition for review of the FCC's rulemaking denial and the parties' cross appeals from the District Court's judgment were argued before the same panel of the Court of Appeals on April 16, 1982. In its decision entered on February 1, 1983, the Court of Appeals accepted the District Court's factual conclusion that the Telecommunications Committee was conducting official agency business at the closed meetings and affirmed its holding that the FCC could continue to close these meetings only if it complied with "stringent closure provisions" of the Government in the Sunshine Act. 54a, 699 F.2d at 1249.⁷

The Court of Appeals reversed the District Court's dismissal of ITT Worldcom's first claim for relief, based on its allegations that the FCC had conducted *ultra vires* negotiations with the foreign administrations. In ruling on the jurisdictional question which the FCC seeks to raise in this Court, the Court of Appeals found that the FCC's attempts to coerce the foreign administrations into giving GTE and Graphnet operating agreements would not, by their nature, result in a final FCC "order" which could be reviewed directly by the Court of Appeals. The Court of Appeals therefore held that the misconduct alleged in ITT Worldcom's complaint fell within the District Court's residual jurisdiction to review final agency "action" which is not a final "order" appealable to the Court of Appeals. The court rejected the FCC's argument that it should review the legality of the FCC's conduct at the meetings when it ruled on ITT Worldcom's appeal from the FCC's

⁷ The Court of Appeals' holding that the FCC had violated the Government in the Sunshine Act was not the first appellate decision finding that the FCC's zeal for encouraging competition had led it to ignore statutory restrictions on its authority. See *ITT World Communications Inc. v. FCC*, 635 F.2d 32 (2d Cir. 1980).

rulemaking denial. The Court of Appeals held that it had no factual or evidentiary "record" before it on the rulemaking appeal that would allow it to determine what had actually occurred at the closed meetings and found that in the absence of such a record, *de novo* fact-finding by the District Court was necessary for adequate judicial review.⁸

D. Postscript: Contrary To The FCC's Representations To This Court, The Decisions Of The Lower Courts Have Not Halted The Consultative Process.

To convince the Court of the importance of this case, the FCC suggests in its petition that the lower courts' construction of the Government in the Sunshine Act has brought the consultative process to a halt, because at the "last CP session" held in Madrid, Spain in October 1980, the foreign administrations "objected strongly" to the steps which were taken to comply with the District Court's order. FCC Petition at 21, n.19.

The FCC's description of the Madrid gathering as the "last" consultative process meeting is completely false. After the Madrid meeting, another consultative process meeting was held as scheduled in New Orleans on February 17 and 18, 1981. In compliance with the District Court's order, the meeting was open, as consultative process meetings had traditionally been, and the foreign administrations participated fully. The New Orleans meeting was described in the trade press as "totally harmonious in tone, and one of the most successful of the series of consultative process sessions which have been held in the past several years." *Telecommunications Reports*, Vol. 47, No. 8, p. 20 (February 20, 1981).

The FCC's reluctance to schedule consultative process meetings since the New Orleans meeting is not caused by the lower

⁸ In portions of its opinion which no party seeks to bring before this Court, the Court of Appeals also reversed the FCC's denial of ITT Worldcom's rulemaking petition, and reversed in part the District Court's ruling sustaining ITT Worldcom's FOIA claims.

courts' decisions, but rather appears to have resulted from the sharp criticism which Senator Goldwater, the Chairman of the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, has made of the FCC's participation in the consultative process. As Senator Goldwater stated at a congressional hearing held contemporaneously with the New Orleans meeting:

I would note for the record that the Acting Chairman of the FCC could not be present for today's hearings because he and Commissioners Washburn and Fogarty and five top staff members are in New Orleans attending a senior level meeting of the North Atlantic Consultative Process.

I want to take this opportunity to comment on the Commission's activities in this area.

The FCC's participation in the planning of international communications facilities has been of concern to me for several years. What initially was an attempt to resolve disagreements over authorization for construction of the TAT-7 submarine cable, has become a permanent process involving the FCC in discussions and decisions properly left to those private corporations responsible for providing the capital to construct the facilities, and the provision of the service over those facilities.

Hearings on S. 271, Serial No. 97-5, 97th Cong., 1st Sess. 2 (February 18, 1981). Senator Goldwater further stated that he expected "to introduce a bill that more narrowly defines the Commission's role" and that "budgetary constraints argue for a careful examination of the Commission's activities." *Id.*⁹

⁹ On June 1, 1981, the FCC released a Notice of Inquiry which initiated a proceeding to plan new communications facilities for the Pacific region. *Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Region Telecommunications Needs During the 1981-1995 Period*, FCC 81-243, 46 F.R. 31286 (June 15, 1981). The Notice of Inquiry stated that "given the U.S. Congress' desire to keep Commission expenditures at a minimum,

Because it was the FCC, rather than the foreign administrations, which insisted that the closed meetings be conducted in private, there is no reason to assume that the lower courts' holdings have deterred the foreign administrations from continuing to participate in the informal exchange of facilities planning information which has traditionally occurred at the open consultative process meetings. What the lower courts' decisions stopped was the FCC's attempt to apply "leverage" and "negotiate" on behalf of ITT Worldcom's competitors, because the FCC knows these efforts to be improper and will not expose them to public scrutiny at an open meeting with the foreign administrations.¹⁰

we expect our role to be restricted principally to the compilation and evaluation of a record" developed from information supplied by the American carriers, and that in contrast to the North Atlantic planning process, the FCC would not be "exchanging information directly with interested foreign entities on a regular basis." 46 F.R. at 31289.

- 10 Congressional passage of the legislation which was before Senator Goldwater's subcommittee when he made the remarks quoted above has a bearing on the significance of the issues raised by the FCC's petition. In the Record Carrier Competition Act of 1981, P.L. 97-130, 95 Stat. 1687, now codified as 47 U.S.C. § 222, Congress directly addressed the concerns of carriers such as GTE and Graphnet which have been unable to negotiate operating agreements with the foreign administrations. Under the Act, GTE and Graphnet now have the right to obtain international transmission services through the interconnection of their domestic facilities with ITT Worldcom and the other established IRCs. With the benefit of these arrangements, the new carriers can now provide international services to their customers without obtaining the direct operating agreements with the foreign administrations which the FCC's Telecommunications Committee sought to negotiate on their behalf during the closed meetings.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Properly Applied The Provisions Of The Government In The Sunshine Act To The Unusual Facts Of This Case.

The FCC's petition for a writ of certiorari is nothing more than a request that this Court review the fact-finding of the lower courts, which rejected the FCC's unsubstantiated claim that its Telecommunications Committee did nothing more than "informally" exchange information with the foreign administrations when they met behind closed doors. In introducing its discussion of the Government in the Sunshine Act, the FCC's petition argues that the Court of Appeals "has held that the Sunshine Act applies to informal exchanges, overseas, by agency delegates with their foreign counterparts. . . ." FCC Petition at 11. The way in which the FCC seeks to frame the issue presented by its petition simply ignores the Court of Appeals' express recognition that the Act "does not *per se* forbid all informal off-the-record discussions between a quorum of an agency and outside parties. . . ." 43a, 699 F.2d at 1244. The Court of Appeals, however, specifically decided that the FCC's closed meetings were *not* "informal discussions" between members," 43a, 699 F.2d at 1244, but rather were "prearranged conferences held to effectuate public business of the greatest import," which "focus[ed] on concrete issues" and which were "in short, an integral part of the Commission's policy making processes. . . ." *Id.*¹¹

¹¹ The American Bar Association ("ABA") has filed a memorandum as *amicus curiae* in support of the FCC's petition. The ABA's memorandum accepts the way in which the FCC's petition characterizes the closed meetings as nothing more than informal and general discussions (although the ABA cites no portion of the Court of Appeals' decision which supports that characterization). The language quoted above makes clear that the Court of Appeals' decision did not deal with "informal" discussions and that the ABA's concerns are unfounded.

It is axiomatic that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967), *quoting Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). It would be particularly inappropriate for the Court to do so in this case because the FCC never attempted to convince the trial court that, as a factual matter, the Telecommunications Committee confined itself to "informal information exchanges" during its closed meetings with the foreign administrations. When it responded to ITT Worldcom's summary judgment motion, which relied on the statements of responsible FCC officials that the Telecommunications Committee was "applying leverage," "in a negotiating stance" and seeking "tit for Tat," the FCC conceded that the facts were not in dispute, in what was presumably a litigation strategy designed to avoid discovery in which ITT Worldcom would develop further evidence of what really went on at the closed meetings.¹² It was only *after* this litigation strategy backfired on the FCC and judgment was entered against it in the District Court that the FCC submitted the two affidavits, in support of its unsuccessful applications for a stay pending appeal, on which it now relies to support its argument that the Telecommunications Committee was merely exchanging information informally. The Court of Appeals might properly have rejected the FCC's post-judgment attempts to supplement the record, but instead fully considered these affidavits in reaching its decision. The Court of Appeals, however, found that these two "vague, conclusory and contradictory" affidavits, which, like the FCC's legal memoranda, were carefully drawn to avoid prejudicing the FCC's position on other points in dispute, did not raise genuine issues of material fact, 45a, 699 F.2d at 1245, n.179, and that the FCC had not met its burden of proof under

12 ITT Worldcom served interrogatories and document demands with its complaint. The FCC's responses to these discovery demands were inadequate, and ITT Worldcom's motion to compel pursuant to F.R.C.P. 37 was pending at the time the District Court entered judgment.

the Government in the Sunshine Act "to overcome the presumption in favor of openness." 43a, 699 F.2d at 1244. See 5 U.S.C. § 552b(h)(2). For the FCC to seek a third opportunity to prove in this Court that the Telecommunications Committee was only exchanging information informally with the foreign administrations, when both lower courts have rejected this claim and there is no credible evidence in the record to support it, is an improper invocation of this Court's jurisdiction on certiorari.¹³

A. The Court Of Appeals Properly Held That The Telecommunications Committee Was "Authorized" To Act On Behalf Of The FCC At The Closed Meetings With Foreign Administrations.

The requirements of the Government in the Sunshine Act are applicable both to the agency itself, and to "any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1). The legislative history of the Act demonstrates that a subdivision is subject to the Act even if it is not authorized to take final action on behalf of the full agency:

A subdivision of an agency . . . is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. *Thus, panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of Section 552b.*

¹³ It should be noted that the FCC has consistently denied ITT Worldcom's counsel the opportunity to cross examine its affiants on the conclusory statements made in their affidavits. The FCC refused to produce the first affiant, Commissioner Lee, for examination at the District Court's hearing on the FCC's stay application in that Court. When the FCC moved for a stay pending appeal four months later in the Court of Appeals, its motion was denied after the FCC declined ITT Worldcom's request to depose FCC staff member Demory, who had submitted a second affidavit in support of that motion.

H. Rep. No. 94-880, 94th Cong., 2d Sess. 7 (1976) (emphasis supplied) (hereinafter, "*House Report*"). *Accord* S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975) (hereinafter, "*Senate Report*").

On one level, the FCC's petition merely asks this Court to review the lower courts' factual findings, when the FCC argues that "there was no basis for the Court of Appeals factfinding" that the Telecommunications Committee was "authorized" to act on behalf of the full FCC at the closed meetings. FCC Petition at 13. The Court of Appeals, however, held that "[t]he Commission concedes elsewhere that the commissioners attend the meetings in their official capacities and *qua* the Telecommunications Committee, and the record amply shows that the Committee acts on the Commission's behalf in seeking to effectuate official agency business." 53a, 699 F.2d at 1249 (footnote omitted).¹⁴

The FCC also argues in this Court that notwithstanding the lower courts' factual findings, a subdivision can *never* be "authorized" to act on behalf of the full agency for purposes of the Government in the Sunshine Act "unless it has received an *official* delegation of authority," presumably by regulation or formal agency order. FCC Petition at 13 (emphasis supplied). The FCC's argument, which is unsupported by citations to precedent or legislative history, would, as the Court of Appeals recognized, allow an agency to evade the requirements of the Act at will simply by ignoring the formalities of delegation. In this very case, the Court of Appeals held, in a portion of its decision which the FCC does not seek to appeal, that the FCC violated Section 5(d) of the Communications Act, 5 U.S.C. § 155(d)(1), when it failed to delegate, "by published rule or order," the authority which the Telecommunications Committee could properly exercise at the closed

¹⁴ The footnote accompanying the Court of Appeals' statement cross-references the FCC's statements, pleadings and affidavits, and the FOIA material submitted by ITT Worldcom, which "amply" support the Court of Appeals' factual conclusion.

meetings. 52a, 699 F.2d at 1248. There is certainly nothing novel about the Court of Appeals' holding that the FCC ought not be allowed to rely on its violation of the Communications Act to justify its failure to comply with the Government in the Sunshine Act.

Furthermore, even if this Court were to accept the FCC's argument, the Telecommunications Committee's existing "official" authorization under 47 C.F.R. § 0.205 is sufficient to support the Court of Appeals' finding that the Telecommunications Committee is "authorized" to act on behalf of the full FCC. As discussed above, this regulation delegates authority to the Telecommunications Committee to act on applications for the construction of new international communications facilities. The only justification which the FCC has ever offered for the Telecommunications Committee's participation in the closed meetings is that the meetings permit the Committee's members to acquire information which will better enable them to discharge this delegated function. Thus, even on the view of the facts most favorable to the FCC, the Telecommunications Committee's closed meetings with the foreign administrations are undeniably part of that Committee's efforts to perform duties which have been officially delegated to it by the full FCC.¹⁵

B. The Court of Appeals Properly Held That The Telecommunications Committee Was Engaged In The Joint Conduct of Official Agency Business During The Closed Meetings.

In attacking the lower courts' factual determination that the Telecommunications Committee was engaged in the joint conduct of official agency business during the closed meetings

¹⁵ The FCC argues in its petition that the Telecommunications Committee does not actually vote upon any applications for new facilities at the closed meetings. This does not excuse its failure to open the meetings because under the Government in the Sunshine Act, "[t]he whole decision-making process, not merely its results, must be exposed to public scrutiny." *Senate Report* at 17-18. *Accord House Report* at 3, 8. See pp. 20-23, below.

with foreign administrations, the FCC criticizes the Court of Appeals' supposed failure to make a separate holding that the Committee was "deliberating" when it conducted that business. The Court of Appeals did not address this point at length because the FCC did not press the argument below. However, the legislative history demonstrates that the use of the word "deliberation" in the Government in the Sunshine Act was not intended to create a prerequisite to the Act's application separate and distinct from the requirement that the agency be engaged in the joint "conduct" of agency business. Rather, the two words are meant to be read together, and are intended to require only that the agency's actions be characterized by a degree of formality before the Act is invoked:

The words "deliberation" and "conduct" were carefully chosen to indicate some degree of formality is required before a gathering is considered a meeting for purposes of this section.

Senate Report at 18. The legislative history contrasts meetings involving deliberations and the conduct of business with "chance encounters," "purely social gatherings," "lunch-
eons" and the like, where no agency business is conducted. *Id.*
Accord House Report at 3.

The FCC's petition argues that the Telecommunications Committee was not conducting "official agency business" at the closed meetings, but this argument is based on the factual predicate, rejected by the Court of Appeals, that the Committee was doing nothing more than "exchanging information" with the foreign administrations. The FCC does not suggest that if, as the lower courts found, its representatives were seeking to coerce or cajole the foreign administrations into giving operating agreements to GTE and Graphnet, these substantive discussions would not constitute, in the Court of Appeals' words, "public business of the greatest import."

Further, even assuming *arguendo* that the FCC had limited itself to "exchanging information" with the foreign administrations, it would by no means follow that the Government in

the Sunshine Act is inapplicable to the closed meetings. As the FCC points out, the Act was not intended to apply to all "informal background discussions which clarify issues and expose varying views." *Senate Report* at 19. However, the overriding goal of the Act was to expose to public scrutiny "not just the formal decision-making or voting but *all* discussions relating to the business of the agency." *House Report* at 8. "The whole decision-making process, not merely its results, must be exposed to public scrutiny." *Senate Report* at 18. The legislative history demonstrates that the Act was intended to apply to the entire information-gathering process which precedes an agency decision.¹⁶

The question of whether an agency is informally obtaining "background" information unrelated to any specific proceeding or is gathering information as a predicate to decision-making is obviously one of fact. In the present case, the Court of Appeals found that the closed meetings are "prearranged conferences" that "focus on concrete issues" (i.e., GTE's and Graphnet's requests for operating agreements and the need for new international facilities). The Court of Appeals further found that the FCC's representatives "convey the information and views 'exchanged' at the meetings to the full commission for its consideration." 37a, 699 F.2d at 1241. While the FCC argues that the Court of Appeals did not find "that the discussions focused on any discrete proposals pending or likely to arise before the agency," FCC Petition at 18, the Court of Appeals actually found that "reference to the Commission's FOIA materials . . . suggests that a number of pending

¹⁶ For example, the legislative history reveals that "[p]anel[s] or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the [Act] to open their meetings." *Senate Report* at 17. The Act applies to "meetings outside the agency . . . if they discuss agency business. . . .," *Senate Report* at 18, and the Act's open-meeting requirement "does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business." *House Report* at 8.

docket proceedings have in fact been discussed at the CP meetings." 50a, 699 F.2d at 1247. And while the FCC argues that the Telecommunications Committee's discussions at the closed meetings "did not predetermine or relate to any future FCC decision" because the FCC has already authorized GTE and Graphnet to provide international service, FCC Petition at 18, any operating agreement which GTE or Graphnet obtains as a result of the closed meetings, and any new international facilities which the foreign administrations seek as a "*quid pro quo*," will in fact require future approval by the FCC or its Telecommunications Committee pursuant to Section 214 of the Communications Act.¹⁷ Thus, even if, as the FCC argues, it only "exchanged information" at the closed meetings, there are ample factual grounds for sustaining the Court of Appeals' conclusion that the closed meetings are "an integral part of the Commission's policymaking processes." 43a, 699 F.2d at 1244.

C. Because The Court of Appeals' Decision Is Based On A Highly Unusual Set Of Facts, Review By This Court Is Not Warranted.

Contrary to the FCC's argument in this Court, the Court of Appeals expressly refused to rule that informal information exchanges between agencies and third parties are *per se* subject to the Government in the Sunshine Act. 42a, 699 F.2d at 1244.¹⁸ To avail itself of the precedential effect of the Court of

17 When the FCC originally authorized GTE and Graphnet to provide international service, it retained jurisdiction to rule on the adequacy of any operating agreements they negotiated before the new carriers initiated service. *ITT World Communications, Inc. v. FCC*, *supra*, 595 F.2d at 902.

18 The Court of Appeals did observe that the "informal information exchange" exception to the Act must be carefully applied to avoid sweeping within it the decision-oriented information gathering process which Congress intended to be conducted in public. 42a-43a, 699 F.2d at 1243-1244. Future cases will have to delineate the boundaries between these two functions. The Court of Appeals had no occasion to do so, because it found that the FCC was seeking the foreign adminis-

Appeals' decision, a future litigant will need to demonstrate that an administrative agency is using closed-door meetings with foreign governmental agencies "as a vehicle" to urge the foreign governments to accept the American agency's substantive policies. 39a, 699 F.2d at 1242. Because the conduct of the nation's foreign policy is committed to the State Department, the possibility of a similar case arising in the future is remote. The problem presented by this case is essentially "academic" or "episodic," and does not merit consideration by this Court. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).¹⁹

Further, in considering the significance of the Court of Appeals' decision, it is important to recognize that the Government in the Sunshine Act does not create an absolute rule requiring open meetings, but rather includes a number of exceptions which permit an agency to close a meeting in appropriate circumstances. Both the District Court and the Court of Appeals specifically invited the FCC to avail itself of 5 U.S.C. § 552b(c)(9)(B), which allows an agency to close a meeting if necessary to prevent "the premature disclosure of [information] which would . . . be likely to significantly frustrate implementation of a proposed agency action." Any agency with statutory authority to negotiate with third parties may presumably use this exemption to close its negotiating sessions on the ground that premature disclosure of the parties' negotiating positions would frustrate the negotiations. That the FCC could not take advantage of this exception to the Act without effectively admitting ITT Worldcom's allegations that it was engaged in *ultra vires* misconduct hardly makes this a case of general applicability or concern.

trations' assent to its policies and not merely gathering information. This case therefore does not present an appropriate opportunity for this Court to consider precisely where the line between "informal" and "formal" information exchanges should be drawn.

19 It should be noted that the Court of Appeals' decision will have no effect on the State Department's conduct of foreign affairs because the State Department is not a collegial body and therefore is not subject to the Government in the Sunshine Act.

II. The Court Of Appeals Properly Held That The District Court, Rather Than The Court Of Appeals, Should Adjudicate ITT Worldcom's Claim That The FCC Engaged In *Ultra Vires* Conduct During Its Closed Meetings With The Foreign Administrations.

This Court's decisions have established a strong presumption that agency actions are subject to judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). When the FCC acts by way of an "order" in a formal administrative proceeding, Section 405 of the Communications Act, 47 U.S.C. § 405, permits an aggrieved party to appeal directly to the Court of Appeals. However, this review procedure is applicable *only* to "final orders." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 415-16 (1942). The judicial review provisions of the Administrative Procedure Act are broader than those of the Communications Act, in that they provide for the review of final agency "actions" which do not take the form of final "orders," 5 U.S.C. § 704, and the District Court has general "federal question" jurisdiction of cases brought under the APA. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The District Court's "jurisdiction is thus residual," in that it permits the review of all forms of final agency action which cannot be brought directly to the Court of Appeals as final orders. *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979).

The Court of Appeals properly held in this case that ITT Worldcom's allegations of *ultra vires* misconduct fell within the District Court's residual jurisdiction. As the Court of Appeals pointed out, "the *ultra vires* count requires scrutiny of conduct occurring outside the formal administrative process." 15a, 699 F.2d at 1230. The FCC's efforts to negotiate with foreign governments therefore did not, and could not, result in a "final order" reviewable in the Court of Appeals.

The FCC argues that the Court of Appeals should have determined the legality of the FCC's conduct at the closed meetings on direct appeal from the FCC's denial of ITT

Worldcom's rulemaking petition because ITT Worldcom raised, or could have raised, this issue in the rulemaking proceedings. As the Court of Appeals observed, this argument "blurs an important distinction between the rulemaking petition and the *ultra vires* count." 14a, 699 F.2d at 1229. In the rulemaking proceeding, ITT Worldcom did not seek a determination of the legality of the FCC's conduct at past meetings, and it would be naive to expect that the FCC would have confessed error if ITT Worldcom had done so. Indeed, the FCC agreed with ITT Worldcom in its rulemaking denial that it lacked authority to negotiate with foreign administrations, and it added a gratuitous denial that it had done so in the past.

The "gravamen of the *ultra vires* count [in the District Court] was very different," because ITT Worldcom there sought to prove that notwithstanding the FCC's self-serving statements, the FCC "has *in fact* secretly exceeded [its] authority and will not admit to having done so." 14a, 699 F.2d at 1229. It would have been literally impossible for ITT Worldcom to prove these allegations, without any "pretrial" discovery, in the notice-and-comment rulemaking proceeding before the FCC. As the Court of Appeals held, the record on the rulemaking appeal was "patently inadequate" to permit the Court of Appeals to determine the legality of the FCC's actions.

We are asked, in essence, to approve of actions about which we know almost nothing. The record consists simply of the Commission's assertions that it has not negotiated, and of numerous statements by agency members that would appear to undercut these assertions. Self-serving representations are no substitute for an adequate record that would enable us to determine with confidence the actual scope of the Commission's endeavors.

48a-49a, 699 F.2d at 1247. The Court of Appeals therefore held that "the jurisdiction of the district courts is properly invoked" because "*de novo* judicial fact-finding is necessary for a fair examination of the disputed issues." 14a, 699 F.2d at 1229.

In reaching this result, the Court of Appeals was careful to point out that its decision was not intended to sanction review in the District Court of an action which "is interlocutory in nature and can be corrected on court-of-appeals scrutiny of a subsequent, final action." 16a, 699 F.2d at 1230. The Court of Appeals held, however, that effective future review was not possible here because the FCC's activities at the closed meetings "are not calculated to result in a final order, but rather to lead to unreviewable actions by foreign administrations." *Id.*

In short, the Court of Appeals permitted District Court review of the FCC's actions in this case only because (1) the actions themselves do not constitute a "final order" reviewable in the Court of Appeals and (2) the Court of Appeals will not have an opportunity to determine the legality of the FCC's conduct on appeal from any future final order. The Court of Appeals' recognition of this limited residual jurisdiction in the District Court will not, as the FCC argues, disrupt the functioning of the administrative process but, to the contrary, is necessary to effectuate this Court's holdings that adequate judicial review is presumptively available to all aggrieved parties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GRANT S. LEWIS

Counsel of Record for Respondent

ITT World Communications Inc.

520 Madison Avenue

New York, New York 10022

(212) 715-8000

Of Counsel:

JOHN S. KINZEY

MARY JO EYSTER

LEBOEUF, LAMB, LEIBY & MACRAE

—and—

HOWARD A. WHITE

SUSAN I. LITTMAN

ITT WORLD COMMUNICATIONS INC.

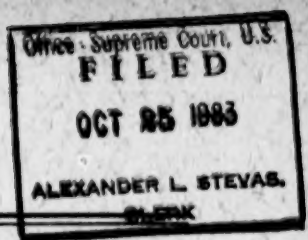
100 Plaza Drive

Secaucus, New Jersey 07096

(201) 330-5000

October 3, 1983

No. 83-371



In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION,
ET AL., PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRUCE E. FEIN
General Counsel
Federal Communications Commission
Washington, D.C. 20554

TABLE OF AUTHORITIES

Page

Cases:

FTC v. Standard Oil Co., 449 U.S. 232 8

Statutes and regulation:

5 U.S.C. 552b(a)(2) 7

5 U.S.C. 552b(c)(9)(B) 5

28 U.S.C. 2347 8

47 C.F.R. 1.2 8

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-371

FEDERAL COMMUNICATIONS COMMISSION,
ET AL., PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONERS

1.a. Respondent's principal argument (see Br. in Opp. 2-3, 16-18, 23-24) is that this Court should deny review because the decision below does not concern "garden variety administrative activities" but is limited to a "highly unusual factual setting" (Br. in Opp. 2). However, respondent fails to identify any "unusual" factors that limit the decision's applicability.

Respondent relies chiefly upon a single three-sentence passage from the court of appeals' decision. (Respondent quotes all or part of this passage no fewer than seven times (Br. in Opp. i, 2-3, 7, 16, 21, 22, 23).) The court of appeals wrote (Pet. App. 43a):

The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members, but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the

communications industry. They are, in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."

We see nothing in this passage that would in any meaningful way limit the court of appeals' decision to "highly unusual" sets of facts. The passage makes clear that the Sunshine Act does not apply to "chance meetings," "social gatherings," or informal discussions attended solely by agency members. The passage also states that, to be covered, discussions must be about something in particular ("[t]hey focus on concrete issues * * *") and must have a serious purpose ("They * * * are conducted to build a 'consensus' that will have far-reaching effects on the structure of the communications industry."). But after these restrictions have been applied, a vast array of administrative activities remain: all prearranged discussions that have a topic and purpose and are attended by outside parties, as well as agency members.

Nor is there a meaningful limit implicit in the vague and conclusory phrase "public business of the greatest import," which respondent repeats five times (Br. in Opp. i, 2-3, 7, 16, 21). What is "public business of the greatest import"? How are the FCC and other agencies to know what the courts will regard as sufficiently important to fall within that description? Similarly, what is meant by "an integral part of the Commission's policymaking process"? (see Br. in Opp. 7, 16, 23). These phrases provide little guidance; they leave the courts with a vast ad hoc discretion to expand the coverage of the Act on the basis of their subjective evaluations of the import and relevance of the particular discussions held by Commission members.

Respondent notes (Br. in Opp. 22) the court of appeals' statement (Pet. App. 37a) that the Commissioners who attended CP meetings "convey[ed] the information and

views 'exchanged' at the meetings to the full Commission for its consideration." But that is hardly "highly unusual"; in fact, it is a natural occurrence whenever some members of a multimember agency attend a gathering related to the agency's work.¹

Finally, respondent points to (Br. in Opp. 16) the court of appeals' statement (Pet. App. 43a) that the Sunshine Act "does not *per se* forbid all informal off-the-record discussions between a quorum of an agency [or subdivision] and outside parties * * *." The very fact that the court found it necessary to express such a disclaimer indicates the breadth of its decision. In the court of appeals' view, the Sunshine Act does not necessarily apply to *every* informal discussion attended by outside parties and a quorum of the agency or a subdivision. (It should be noted that in the case of the FCC, a quorum of its three-person standing committees is two members). But the court apparently contemplated that

¹ Respondent also relies upon (Br. in Opp. 5, 24) the court of appeals' statement (Pet. App. 39a) that the FCC chose "the CP as the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements." But in order to understand what this statement means, it is necessary to recall that this case was decided on cross motions for summary judgment on the basis of those facts that were not in dispute (see pages 4-5, *infra*). While respondent contended that the Commission was using the CP sessions to negotiate on behalf of Graphnet and Telenet (Pet. App. 7a), the Commission maintained that the CP sessions merely involved "the exchange of information and views" for the purpose of "improv[ing] foreign understanding of the bases for and nature of [the Commission's] procompetition policies" (*id.* at 6a). The court of appeals' statement upon which respondent relies cannot properly mean more than what the Commission conceded. It therefore means only that the CP sessions may have assisted Graphnet and Telenet by informing the foreign telecommunications administrators concerning the bases for and nature of the Commission's policies. We see nothing "highly unusual" (Br. in Opp. 2) about discussions with such a general informative or educational purpose.

most such discussions would be covered and stated (*ibid.*) that "an agency's burden of persuasion must be especially great in such situations."

In sum, respondent has failed to show that the court of appeals' decision is based upon any unusual facts that limit its potential applicability. As pointed out in our petition (Pet. 20), "[u]nder the court of appeals' approach, the Act would appear to apply whenever two or more agency members acting under what may be deemed unofficial agency authorization attend a gathering at which any matter viewed by the courts as related in some significant way to the agency's business is discussed."

b. Respondent seeks to portray the court of appeals' holding more narrowly by quoting extensively (see Br. in Opp. 5, 6-7, 17) from a portion of the court's opinion (Pet. App. 6a-7a) that summarized the parties' factual assertions concerning the nature of the CP meetings. The court of appeals' decision is, however, not based on the facts contained in those assertions. The court began this portion of its opinion by noting that "[t]he specific nature of these off-the-record discussions is sharply contested * * *" (*id.* at 6a). The court then summarized the Commission's contentions (*id.* at 6a) and those of respondent (*id.* at 7a). Since the Sunshine Act issue was decided on cross motions for summary judgment (*id.* at 12a), it is clear that the court of appeals' decision was not based upon these "sharply contested" facts.

Respondent's brief obscures this point by commingling the court's explanation of the basis for its decision with respondent's own factual assertions, as summarized by the court of appeals (see Br. in Opp. 5, 6-7). (This is most apparent in the long quotation on page seven of the brief in opposition. The part of the quotation preceding the asterisks is taken from the court of appeals' summary of

respondent's factual assertion (Pet. App. 7a), while the portion following the asterisks, which is part of the court's own conclusions, occurs some 30 pages later in the opinion (*id.* at 43a)). Respondent then suggests that the court of appeals accepted its version of the disputed facts (Br. in Opp. 17-18) and that we are asking this Court to "review the fact-finding of the lower courts" (Br. in Opp. 16). In fact, however, the courts below did not make findings on the "sharply contested" factual issues. Instead, the court of appeals' decision was based upon the — relatively few — undisputed facts concerning the nature of the CP meetings. Those facts do not effectively limit the court's decision to "highly unusual" situations.²

It may be, as we stated in the petition (Pet. 20), that the court of appeals in future cases would restrict the apparent breadth of its decision in this case. But unless agencies take action arguably in violation of the decision below — something they are properly reluctant to do — such future cases will not arise. Unless reversed, therefore, the decision below will have a chilling effect on proper and useful activities by agency members.³

²Respondent contends (Br. in Opp. 24) that the decision below will not have an adverse impact because CP sessions can be closed under 5 U.S.C. 552b(c)(9)(B) on the ground that "the premature disclosure" of the discussions "would . . . be likely to significantly frustrate implementation of a proposed agency action." This argument misses the point for two reasons. First, the issue here is not when but whether the CP discussions must be made public and thus the applicability of 5 U.S.C. 552b(c)(9)(B) is doubtful. Second and more important, even if the CP issues fell within one of the Sunshine Act's narrow exceptions, the court of appeals' decision applies to many informal gatherings not protected by any exception. The harmful effects of the court of appeals overly broad interpretation of the Act's coverage are not cured by the Act's narrow exceptions.

³ITT's assertion (Br. in Opp. 13) that "the decisions of the lower courts have not halted the consultative process" is partially correct, but misses the point. There have been CP meetings following the district

2. Respondent's contentions concerning the correct interpretation of the Sunshine Act (Br. in Opp. 18-23) were substantially addressed in the petition and do not require extended response at this time.

Respondent concedes (Br. in Opp. 21) that the court of appeals simply deleted the element of "deliberations" from the statute. Respondent's contention (Br. in Opp. 21) that this is what Congress intended is squarely at odds with well-established canons of statutory construction and is not supported by the legislative history. Respondent's claim (Br. in Opp. 21) that the court of appeals was not called upon to decide this issue is belied by the court's opinion. The court noted (Pet. App. 37a) that "[d]eliberations" might be read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency." But the court rejected that interpretation (*id.* at 37a-45a) and also expressly rejected the distinction drawn by the Commission "between an agency's predecisional activities and its postdecisional efforts to implement interpret, and promote its policies" (*id.* at 39a).

court's decision. However, as ITT surely knows, those meetings involved only facilities planning consultations. As pointed out in the petition (Pet. 6-7), such meetings have traditionally been conducted, by voluntary agreement of all parties, in open session with carrier representatives present. See also Pet. App. 78a. CP meetings held after the district court decision did not involve the discussion of telecommunications policy issues that were considered in closed CP sessions that led to this litigation. We certainly did not mean to suggest in our petition that the decision of the court of appeals had or would prevent *any* contact between FCC members and foreign administrations. But there can be little doubt that the lower court's decision here has and will restrict agency members' ability to discuss and exchange information with their foreign counterparts on sensitive international telecommunications policy issues in a manner never intended by Congress when it adopted the Sunshine Act.

In response to our argument that the Sunshine Act applies to agency subdivisions only if they are lawfully authorized to act on the agency's behalf, respondent contends for the first time (Br. in Opp. 20) that the Telecommunications Committee was officially authorized to act on the Commission's behalf at the CP sessions because the Committee is authorized to act on certain applications for permits to construct international communications facilities. However, the court of appeals' decision was not based on this ground, and respondent has never claimed that the Committee members were considering such applications during the CP sessions.

Respondent argues (Br. in Opp. 21) that the CP sessions "result[ed] in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)) because "the lower courts found [that the FCC's] representatives were seeking to coerce or cajole the foreign administrations into giving operating agreements to GTE and Graphnet." No such findings were made. The Commission has always contested respondent's contention that the attending Commissioners negotiated with their foreign counterparts (Pet. App. 7a), and this factual dispute was not and could not have been adjudicated at the summary judgment stage.⁴

⁴Respondent contends (Br. in Opp. 21-22) that even if the attending commissioners merely exchanged information with their foreign counterparts, that would constitute "the joint [conduct or disposition] of official agency business," principally because some of the information exchanged might have a bearing upon future FCC actions. This was not the basis for the court of appeals' holding and in any event, if "the joint conduct or disposition of agency business" occurs whenever agency members are exposed to information that may be related in some way to some future agency action, the Sunshine Act's coverage will be stretched to an unreasonable degree not intended by Congress.

3. Respondent contends (Br. in Opp. 25-27) that the district court had jurisdiction to entertain its ultra vires claim, despite the fact that exclusive jurisdiction to review FCC orders is vested in the courts of appeals, because "[t]he FCC's efforts to negotiate with foreign governments * * * did not, and could not, result in a 'final order' reviewable in the Court of Appeals" (Br. in Opp. 25). This assertion is false, as our petition pointed out (Pet. 23-24).

First, there is no real distinction between the issue raised in respondent's ultra vires count and its rulemaking petition, the denial of which was reviewed by the court of appeals.

Second and perhaps more important, even if there were some difference between the two issues, respondent could have obtained court of appeals review of the precise issue raised in its ultra vires count by couching its rulemaking petition in slightly different terms or by petitioning the Commission for a declaratory ruling (47 C.F.R. 1.2). Any subsequent Commission order would then have been subject to review in the court of appeals.

Respondent argues (Br. in Opp. 26) that the administrative record in this case was inadequate and that district court proceedings were therefore required. But, as noted in our petition (Pet. 24), the administrative record could have been supplemented on remand to the Commission or to a special master. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 244-245 (1980); 28 U.S.C. 2347. Inadequacy of the administrative record consequently provides no ground for circumventing the exclusive procedures for judicial review established by Congress.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

BRUCE E. FEIN
General Counsel
Federal Communications Commission

OCTOBER 1983

No. 83-371

Office-Supreme Court, U.S.
FILED

OCT 3 1983

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

ITT WORLD COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**MEMORANDUM OF THE
AMERICAN BAR ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

WALLACE D. RILEY *
President
American Bar Association
MARTIN F. RICHMAN
SALLY KATZEN
1155 East 60th Street
Chicago, Illinois 60637
(312) 947-4000

* Counsel of Record

October 3, 1983

QUESTION PRESENTED

Amicus Curiae the American Bar Association ("ABA") addresses the following question:

Whether the Government in the Sunshine Act, 5 U.S.C. § 552b, which generally requires that agency meetings be open to public observation, applies when members of an administrative agency who do not constitute a quorum and have not been authorized to conduct official business on the agency's behalf participate in informal and general discussions with their foreign counterparts concerning issues of common interest.*

* The petitioners also raise a second question:

"Whether suit may be brought in district court to enjoin allegedly *ultra vires* action by the Federal Communications Commission even though jurisdiction to review the agency's orders is vested exclusively in the court of appeals and the precise issue raised in the district court suit could have been reviewed by this method." Petition for a Writ of Certiorari at 6.

While the ABA regards this question as important and as one that should be resolved by the Court, we do not discuss this issue here inasmuch as the ABA has no established policy position with respect to this issue.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF AMICUS CURIAE	1
ARGUMENT	3
CONCLUSION	6

TABLE OF AUTHORITIES

Case

<i>ITT World Communications, Inc. v. FCC</i> , 699 F.2d 1219 (D.C. Cir. 1983)	passim
--	--------

Statutes

Government in the Sunshine Act, 5 U.S.C. § 552b (1982)	passim
5 U.S.C. § 554(d) (1982)	4
5 U.S.C. § 557(d) (1982)	4

Miscellaneous

ABA Const., art. 1, § 1.2	2
1 Gov't Disclosure (P-H) ¶ 10,303	5
100 Rep. A.B.A. 665 (1975)	2
H.R. Rep. No. 880 (Part 1), 94th Cong., 2d Sess. (1976)	4
S. Rep. No. 354, 94th Cong., 1st Sess. (1975)	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-371

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

ITT WORLD COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**MEMORANDUM OF THE
AMERICAN BAR ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

The ABA respectfully submits this Memorandum *amicus curiae* in support of the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit. That decision is reprinted in Appendix A to the petition and is reported at 699 F.2d 1219. Counsel for the petitioners and counsel for the respondents have consented to the filing of this Memorandum.

INTEREST OF AMICUS CURIAE

The ABA is an organization of more than 290,000 members of the bar, including lawyers in private practice

and in the Government. The stated purposes of the organization are, *inter alia*, "to advance the science of jurisprudence" and "to promote throughout the nation the administration of justice." ABA Const., art. 1, § 1.2. Within that broad mandate, the ABA has a special interest in ensuring that the procedures followed by administrative agencies are conducive to effective and rational decisionmaking and at the same time that they provide an environment of fairness and due process to all interested parties.

Through its Section of Administrative Law (composed of lawyers with particular expertise or interest in this area), the ABA has been involved in the study of procedural laws including, among others, the Government in the Sunshine Act. As a result of work undertaken by a Special Committee on Open Meetings Legislation, the House of Delegates of the ABA, in 1975, adopted a resolution generally favoring the then-pending legislation, with the caveat that

"[t]he definitions of agency 'meeting' should be limited to relatively formal gatherings, of at least the number of members required to take action on behalf of the agency, that result in the conduct of official agency business. Chance encounters and informational or exploratory discussions of agency members should not be included in the definition unless they predetermine agency action." 100 Rep. A.B.A. 665 (1975).

The ABA's position was presented to Congress through testimony of the then-Chairman of the Section of Administrative Law, and the Special Committee worked actively to secure passage of the legislation.

In addition, the ABA has sponsored the Commission on Law and the Economy, which studied the effective functioning of administrative agencies, and the ABA's Coordinating Group on Regulatory Reform has, in recent years, worked closely with Congress in considering issues

involving judicial review of agency orders. This case raises important issues about the administrative process and judicial review thereof, issues that have broad implications with respect to the capacity of administrators to make informed decisions in the public interest.

ARGUMENT

The court of appeals holding that the Sunshine Act applies to informal exchanges of information by administrative agency members who are not authorized to act on behalf of the agency is unprecedented and, without in any way promoting the objectives of the Act, calls into question the ability of such members to engage in the kind of informal, but nonetheless informative, discussions that are essential to enable them to carry out their statutory duties.

The Sunshine Act was not promulgated to impede the practical capacity of members of administrative agencies to communicate among themselves, with their staffs, with other agencies, and with members of the public if less than the number of agency members required to take action are involved in the discussions at any given time and if those discussions do not result in or determine agency action. But the effect of the court's decision is to do just that. By unnecessarily hampering the power of agency administrators to garner information essential to the development of expertise and to reasoned decision-making, the court deals a critical and unnecessary blow to the efficacy of the administrative process.

The essence of the controversy turns on the Sunshine Act's definition of meeting:

"the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business" 5 U.S.C. § 552b(a)(2) (1982).

The court chose to read this definition as encompassing, *inter alia*, informal meetings with outsiders, although it conceded that the term "deliberations" could be "read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency." 699 F.2d at 1241.¹

The court based its broad and far reaching interpretation on a single sentence in the legislative history of the Sunshine Act—the suggestion by the Senate Committee that the definition of meeting was intended to include "*hearings and meetings with the public.*" *Id.* (quoting S. Rep. No. 354, 94th Cong., 1st Sess. 18 (1975)) (emphasis added by the court). Whatever the force of that sentence, the court's interpretation clearly stretches it beyond its plain meaning. When the text of the Act is compared with the congressional concern it is clear that the Senate Committee simply meant that if the functional requirements of the definition of meeting were otherwise met—that is, the conversations constituted deliberations involving the joint conduct or disposition of agency business—the gathering would be a meeting subject to the requirements of the Act, even if it took the form of a hearing or meeting with members of the public. This is so because the Sunshine Act is directed at deliberations *among* agency members; it is not directed at communications *between* agency members (or staff) and persons outside the agency. The latter is the purview of the *ex parte* rules. See 5 U.S.C. §§ 554(d), 557(d) (1982).

¹ Subsequently, the court summarily disposed of the argument that the Act supports a distinction between pre-decisional and post-decisional activities. 669 F.2d at 1242. Yet the entire structure of the Act and, particularly, the use of the term "deliberations" suggest that it is the agency's decisional process and not its implementation process which is governed by the Act. And there is no question that what was involved in this case was an effort by agency members to implement through discussions with their foreign counterparts an agency decision already made in compliance with the Sunshine Act.

A second prong of the court's holding relates to the provision that for a meeting to be covered by the Sunshine Act, there must be at least a quorum of the agency or a quorum of a "subdivision . . . authorized to act on behalf of the agency." 699 F.2d at 1240 (quoting H.R. Rep. No. 880 (Part 1), 94th Cong., 2d Sess. 7 (1976)). The court found that the FCC members who participated in the discussions were authorized to attend the CP meetings in their official capacity and, further, that they constituted a quorum of a Telecommunications Committee, which was authorized to make a limited number of specified decisions on behalf of the FCC. 699 F.2d at 1248-49. While the FCC rules make clear that none of the matters within the purview of the committee required or involved attendance at the CP meetings, or were in fact undertaken at the CP meetings, the court nonetheless concluded that, because a quorum of this committee was present, the commissioners constituted a "subdivision . . . authorized to act on behalf of the agency." 699 F.2d at 1240. In so ruling, the court seems to have regarded the requirement for authorization "to act on behalf of" the FCC as meaning no more than an authorization to "be present" or "to discuss" agency matters. *See* 699 F.2d at 1240-41.

If the court's construction is correct, the result is a substantial increase in the coverage of the Act. At present, over 50 agencies are covered by the Sunshine Act and substantial numbers of state agencies attempt to comply with its provisions or the provisions of similar state statutes. 1 Gov't Disclosure (P-H) ¶ 10,303. The court's decision in this case—a decision of enormous precedential significance—places those agencies in an untenable position. For if any two or more members of a collegial agency are authorized to represent the agency in any gathering or forum, however limited their authority to act, and if any discussion of agency business at such a gathering meets the "deliberations" test, then, under the court's decision, these members may not meet with per-

sons from outside the agency to discuss any matter within the official concern of the agency without complying with the provisions of the Sunshine Act. Such a result would have a pronounced (and deleterious) effect on the interaction between the agencies and the public, which the court itself recognizes to be "the 'bread-and-butter' of government administration." 699 F.2d at 1249.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALLACE D. RILEY

President

American Bar Association

MARTIN F. RICHMAN

SALLY KATZEN

1155 East 60th Street

Chicago, Illinois 60637

(312) 947-4000

October 3, 1983

No. 83-371

Office - Supreme Court, U.S.

FILED

JAN 9 1984

ALEXANDER L. STEVENS
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE

Solicitor General

RICHARD K. WILLARD

Acting Assistant Attorney General

KENNETH S. GELLER

Deputy Solicitor General

ALBERT G. LAUBER, JR.

Assistant to the Solicitor General

LEONARD SCHAITMAN

FRANK A. ROSENFELD

Attorneys

BRUCE E. FEIN

General Counsel

DANIEL M. ARMSTRONG

Associate General Counsel

C. GREY PASH, JR.

Attorney

Federal Communications Commission

Washington, D.C. 20554

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTIONS PRESENTED

1. Whether the Government in the Sunshine Act, 5 U.S.C. 552b, which generally requires that agency meetings be open to public observation, applies when members of an administrative agency, who do not constitute a quorum and have not been authorized to conduct official business on the agency's behalf, participate in informal, general discussions with their foreign counterparts concerning issues of mutual interest.

2. Whether suit may be brought in the district court to enjoin allegedly ultra vires action by the Federal Communications Commission, even though jurisdiction to review that agency's orders is vested exclusively in the court of appeals and the precise issue raised in the district court could have been reviewed by this method.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the United States is a petitioner, and Southern Pacific Communications Company and RCA Global Communications, Inc., are respondents.




TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Summary of argument	13
Argument:	
I. The Consultative Process sessions were not meetings of the FCC, and thus were not subject to the Sunshine Act's open meeting requirements ...	15
A. The Consultative Process sessions were attended neither by a quorum of the FCC nor by a quorum of a subdivision authorized to act on its behalf.....	17
B. The Consultative Process sessions did not involve "deliberations" ...	24
C. The Consultative Process sessions did not "determine or result in the joint conduct or disposition of official agency business"	27
D. The Consultative Process sessions were not "meetings of the FCC" .	34
II. The district court lacked jurisdiction to consider ITT's ultra vires claim	38
A. The courts of appeals have exclusive jurisdiction to review FCC orders, and this exclusivity is based on sound considerations of policy and practicality	38

IV

Argument—Continued:	Page
B. ITT's ultra vires claim could have been reviewed by the court of ap- peals under 47 U.S.C. 402(a), and the district court thus had no ju- risdiction to consider it	40
Conclusion	49
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>AT&T Co., In re</i> , 73 F.C.C.2d 248	35
<i>California Ass'n of the Physically Handi- capped, Inc. v. FCC</i> , No. 80-6088 (9th Cir. Dec. 8, 1983)	46, 48
<i>Chisholm v. FCC</i> , 538 F.2d 349, cert. denied, 429 U.S. 890	44
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402	19
<i>City of Peoria v. General Electric Cablevision Corp.</i> , 690 F.2d 116	39, 44, 45
<i>City of Rochester v. Bond</i> , 603 F.2d 927 ...	39, 46
<i>Deutsche Lufthansa Aktiengesellschaft v. CAB</i> , 479 F.2d 912	47
<i>Far East Conference v. United States</i> , 342 U.S. 570	45
<i>FCC v. Midwest Video Corp.</i> , 440 U.S. 689	46
<i>Forsham v. Harris</i> , 445 U.S. 169	16
<i>Gaunce v. deVincentis</i> , 708 F.2d 1290	39
<i>Graphnet Systems, Inc., In re</i> , 63 F.C.C.2d 402	4, 31
<i>Harrison v. PPG Industries, Inc.</i> , 446 U.S. 578	45

Cases—Continued:	Page
<i>HBO, Inc. v. FCC</i> , 567 F.2d 9, cert. denied, 434 U.S. 829	46
<i>International Relay, Inc., In re</i> , 77 F.C.C.2d 819	31
<i>Investment Company Institute v. Board of Governors of the Federal Reserve System</i> , 551 F.2d 1270	46-47
<i>ITT World Communications, Inc. v. FCC</i> , 595 F.2d 897	4, 31
<i>Lake Carriers Ass'n v. United States</i> , 414 F.2d 567	46
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U.S. 41	40
<i>National Muffler Dealers Ass'n v. United States</i> , 440 U.S. 472	22
<i>New York State Broadcasters Ass'n v. United States</i> , 414 F.2d 990	44
<i>NLRB v. Sears, Roebuck & Co.</i> , 421 U.S. 132	32
<i>PATCO v. FLRA</i> , 672 F.2d 109	46
<i>Pennhurst State School v. Halderman</i> , 451 U.S. 1	32
<i>Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic</i> , 400 U.S. 62	39
<i>Ricci v. Chicago Mercantile Exchange</i> , 409 U.S. 289	45
<i>Sangamon Valley Television Corp. v. United States</i> , 269 F.2d 221	46
<i>Texas Pac. Ry. v. Abilene Cotton Oil Co.</i> , 204 U.S. 426	
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1	19

Cases—Continued:	Page
<i>Whitney National Bank v. Bank of New Orleans</i> , 379 U.S. 411	39, 40, 43, 44-45, 47
<i>Writers Guild of America, Inc. v. American Broadcasting Companies, Inc.</i> , 609 F.2d 355, cert. denied, 449 U.S. 824	45, 46
Statutes and regulations:	
Administrative Procedure Act, 5 U.S.C. 701 <i>et seq.</i> :	
5 U.S.C. 703	39
5 U.S.C. 704	39
Communication Act, 47 U.S.C. 151 <i>et seq.</i> :	
47 U.S.C. 151	3
47 U.S.C. 154(h)	17
47 U.S.C. 154(j)	33
47 U.S.C. 155(d)(1)	12, 17, 18, 21
47 U.S.C. 214	3, 17
47 U.S.C. 319	18
47 U.S.C. 402	2
47 U.S.C. 402(a)	10, 38-39, 40, 44, 48
Freedom of Information Act, 5 U.S.C. 552(b)	2
Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 5 U.S.C. 552b:	
5 U.S.C. 552b (§ 2, 90 Stat. 1241)	2, 12, 15, 16, 32
5 U.S.C. 552b(a)(1)	12, 14, 16, 21
5 U.S.C. 552b(a)(2) ..	2, 13, 16, 21, 24, 26, 33
5 U.S.C. 552b(b)	2, 34
5 U.S.C. 552b(c)	2, 34
5 U.S.C. 552b(c)(1)	33, 36
5 U.S.C. 552b(c)(3)	36
5 U.S.C. 552b(c)(10)	36
5 U.S.C. 552b(d)	26
5 U.S.C. 552b(d)(1)	2, 26, 33, 34

VII

Statutes and regulations—Continued:	Page
5 U.S.C. 552b(d)(2)	3, 26, 34
5 U.S.C. 552b(d)(4)	26, 34
5 U.S.C. 552b(3)	26
5 U.S.C. 552b(e)(1)	2, 34
5 U.S.C. 552b(e)(2)	2, 26, 34
5 U.S.C. 552b(f)(1)	3, 34
5 U.S.C. 552b(f)(2)	3, 34
5 U.S.C. 552b(h)(1)	3
Logan Act, 18 U.S.C. 953	10
28 U.S.C. (Supp. V) 1331	39
28 U.S.C. 2342	2
28 U.S.C. 2342(1)	38, 39
28 U.S.C. 2347(b)(3)	46
Pub. L. No. 97-253, tit. V, § 501(b), 96 Stat. 805	17
Pub. L. No. 97-259, § 105(b), 96 Stat. 1091 (to be codified at 47 U.S.C. 155(c)(1))	17
47 C.F.R.:	
Section 0.215	18
Section 0.4	17
Section 1.2	44
 Miscellaneous:	
R. Berg & S. Klitzman, <i>An Interpretive Guide to the Government in the Sunshine Act</i> (1978)	19, 20, 23, 25, 28, 29
<i>Black's Law Dictionary</i> (5th ed. 1970)	24
121 Cong. Rec. 244 (1975)	25
122 Cong. Rec. (1976):	
p. 24203	25, 28
p. 28474	28
H.R. 5075, 94th Cong., 1st Sess. (1975)	19, 33
H.R. 9868, 94th Cong., 1st Sess. (1975)	19, 27

VIII

Miscellaneous—Continued:	Page
H.R. 10315, 94th Cong., 1st Sess. (1975) . . .	27
H.R. 11656, 94th Cong., 2d Sess. (1976) . 19, 25, 27	
H.R. Rep. 94-880 (Pt. I), 94th Cong., 2d Sess. (1976)	22
L. Jaffe, <i>Judicial Control of Administrative Action</i> (1965)	45
Note, <i>Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals</i> , 88 Harv. L. Rev. 980 (1975)	40
S. 3881, 92d Cong., 2d Sess. (1972)	33
S. 261, 93d Cong., 1st Sess. (1973)	33
S. 5, 94th Cong., 1st Sess. (1975) . . . 19, 25, 27, 33	
S. Comm. Print No. 2, 94th Cong., 1st Sess. (1975)	25
S. Conf. Rep. 94-1178, 94th Cong., 2d Sess. (1976)	25, 28
S. Rep. 94-354, 94th Cong., 1st Sess. (1975)	<i>passim</i>
<i>Webster's New World Dictionary</i> (2d college ed. 1974)	14, 20, 24

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-371

**FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS**

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

***ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT***

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 699 F.2d 1219. The opinion of the district court (Pet. App. 60a-66a) is not reported. The opinion of the Federal Communications Commission (Pet. App. 70a-87a) is reported at 77 F.C.C.2d 877.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on February 1, 1983. A timely petition for rehearing (Pet. App. 57a-58a) was denied on April 6, 1983. By order dated July 1, 1983, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 3, 1983. The petition was filed on September 2, 1983, and was granted on October 31, 1983 (J.A. 180). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of 5 U.S.C. 552b, 28 U.S.C. 2342, and 47 U.S.C. 402 are set forth in a statutory appendix (App., *infra*, 1a).

STATEMENT

1. The Government in the Sunshine Act, 5 U.S.C. 552b, requires that agency "meetings" generally be open to the public. The term "meeting" is defined (5 U.S.C. 552b(a)(2)) to mean

the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.

If a covered agency plans to hold a "meeting" as defined in the Act, it must publicly announce, at least one week in advance, "the time, place, and subject matter of the meeting [and] whether it is to be open or closed to the public" (5 U.S.C. 552b(e)(1)). A meeting may be called on shorter notice only if "a majority of the members of the agency determines by a recorded vote that agency business [so] requires * * *" (*Ibid.*). Once a "meeting" has been publicly announced, its format may be changed only by similar recorded vote (5 U.S.C. 552b(e)(2)).

With narrow exceptions, "every portion of every meeting of an agency shall be open to public observation" (5 U.S.C. 552b(b)). The ten exceptions, set forth in Section 552b(c), "are based in most respects on [those] contained in the Freedom of Information Act." S. Rep. 94-354, 94th Cong., 1st Sess. 3 (1975), citing 5 U.S.C. 552(b). An agency may close a meeting (or portion of a meeting) on the basis of these exceptions only by taking a formal, recorded vote (5 U.S.C. 552b(d)(1)). Within one day of voting to close a meeting, the agency must publish the votes cast by each

member and "a full written explanation of its action * * *" (5 U.S.C. 552b(d)(2)). For any closed meeting, the agency must prepare a complete transcript or recording (or, in some cases, a set of detailed minutes) and must permit public inspection of any portion thereof not protected by the exception under which the meeting was closed (5 U.S.C. 552b(f)(1) and (2)).

"[A]ny person" may seek judicial review of an agency's compliance with the Sunshine Act by bringing suit in federal district court. 5 U.S.C. 552b(h)(1). Venue lies in "the district in which the agency meeting is held or in which the agency * * * has its headquarters, or in * * * the District of Columbia." If the court finds that the agency has conducted a meeting in violation of the Act, it "may grant such equitable relief as it deems appropriate," including disclosure of the transcript (if any) or an injunction against future violations. *Ibid.*

2. The Communications Act grants the Federal Communications Commission (FCC) power to regulate "interstate and foreign commerce in communication by wire and radio * * *." 47 U.S.C. 151. As part of this mission, the FCC regulates common carriers of record (non-voice) communications, such as telex, in the international market. A common carrier may acquire facilities to initiate new service only after obtaining from the FCC a certificate of "public convenience and necessity." 47 U.S.C. 214. Yet the Commission has the power to authorize new service only on the American end of an international telecommunications link. Thus, as a practical matter, an international record carrier cannot begin operations until it reaches agreements with government agencies in the foreign countries it hopes to serve.

Respondents ITT World Communications, Inc. (ITT), and RCA Global Communications, Inc., are two of the companies that now "dominate[]" the international record carrier market (Pet. App. 3a). In 1977, the FCC authorized two new companies, Graphnet Systems, Inc.,

and GTE Telenet Communications Corp., to compete with respondents in this field. See *In re Graphnet Systems, Inc.*, 63 F.C.C.2d 402. ITT challenged these authorizations, in part on the ground that the new companies had not yet obtained interconnection agreements with foreign telecommunications agencies, but the Second Circuit rejected this challenge. *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 903 (1979).

Despite the FCC's authorizations, the European agencies, with which respondents had been doing business for years, refused to enter into agreements with Graphnet and Telenet (Pet. App. 4a).¹ On three occasions between October 1979 and October 1980, several members of the FCC held informal discussions with their European and Canadian counterparts that to some extent touched upon this situation. These discussions took place in Europe, as part of an on-going series of conferences among telecommunications administrators known as the "Consultative Process." Pet. App. 78a.

The Consultative Process, begun in 1974, "reflect[ed] the mutual desire of all participants to improve * * * the usage planning of jointly-owned telecommunications facilities in the North Atlantic Region" (Pet. App. 78a). European administrators often misunderstood the basis for FCC regulatory decisions; the Consultative Process originated as a way to help alleviate such misunderstandings, its format—typically described as an "exchange of views"—being dictated by a strong European preference for "informality" (J.A. 80, 87, 92, 159). European and American officials recognized that their views on telecommunications matters, such as the need for standardized facilities (J.A. 128-129) or additional trans-Atlantic cables (J.A. 82), often diverged. The Consultative Process was seen as a useful way "to iden-

¹ In recent years, these companies have obtained operating agreements with some foreign nations, and now offer limited service in competition with respondents.

tify the different approaches being used by the different parties, to narrow differences, and to move toward consensus" (J.A. 78). Consultative Process sessions have never been open to the public. Until October 1979, however, the major U.S. international record carriers were invited to attend (Pet. App. 5a).

In October 1979 a Consultative Process conference was held in Dublin, Ireland. It was attended by three FCC Commissioners and by representatives of the British, Canadian, French, Italian, Swedish, and Swiss telecommunications agencies (Pet. App. 5a-6a; J.A. 109). The Commissioners suggested expanding the agenda to include non-facilities topics such as new carriers and services (Pet. App. 78a). Incumbent U.S. record carriers, including respondents, were excluded from this part of the session.² The agenda was expanded to include these topics in the hope that the "consultative process [might] provide a mechanism for increasing cooperation" in the area of new overseas service arrangements (J.A. 52, 80). The Commissioners, in correspondence with their European counterparts, emphasized that they were "not seeking to negotiate the resolution of difference[s] but only to establish a mechanism to facilitate the exchange of information and views" (J.A. 87). Indeed, the Commissioners "often * * * observed [that] the FCC cannot, and should not, negotiate final facilities arrangements;" that the Commission "must remain under U.S. law unhindered to make its best determination about an overall facilities plan;" and that the FCC "cannot be in a position of prejudging or seeming to prejudge any final determinations by reaching prior agreements in an international

² Respondents were likewise excluded from those portions of two subsequent Consultative Process sessions—held in Ascot, England, in February 1980, and Madrid, Spain, in October 1980—during which new carriers and services were discussed. See Pet. App. 6a; J.A. 92, 127-141, 177-179.

forum" (J.A. 78). European participants realized "the limited scope of authority" of the attending Commissioners, explicitly recognizing that "it was not within the terms of the [Consultative Process] to make recommendations, take decisions, or to change the situation" (J.A. 128). Rather, the hope was that, if participants understood others' strongly held views, national agencies in their internal decisionmaking would be more willing to make accommodations, thus achieving a measure of "comity" (J.A. 82, 167), "reciprocity" (*id.* at 64), and "greater cooperation in the introduction of new services" (*id.* at 52).

3. Apparently concerned that the Consultative Process agenda, as expanded in Dublin, "could ultimately lead to greater competition in the provision of international communications services," ITT filed, on October 24, 1979, a rulemaking petition that "in effect challenge[d] [the FCC's] authority to engage in any form of foreign consultative discourse" (Pet. App. 78a-79a). First, ITT asserted that the Commission "lack[ed] authority to participate in" the kind of discussions held in Dublin and asked the FCC to "issue a policy statement delineating the proper scope of [the Consultative Process] and the authority of Commissioners and staff to participate" therein (J.A. 33). ITT correctly noted (*id.* at 34) that the Commission has no authority "to 'negotiate' with foreign governments." While acknowledging that the FCC in the past had "exercised care in consulting rather than negotiating," ITT expressed concern that foreign officials might misinterpret the expanded Dublin consultations "as efforts to negotiate" (*id.* at 35). ITT urged the Commission "expressly [to] disclaim any intention to negotiate with foreign administrations, or to attempt to subject [them] to its regulatory jurisdiction" (*id.* at 47). Furthermore, in the event the Commission decided that its members could permissibly engage in foreign discussions, ITT sought the issuance of

procedural rules to govern the Consultative Process. ITT submitted that its proposed rules comported "with the spirit and the letter" of the Sunshine Act (Pet. App. 72a).³

The Commission denied ITT's rulemaking petition (Pet. App. 70a-87a). It stated that it had never "negotiated" with foreign telecommunications officials and that the latter fully understood the limited scope of the attending Commissioners' role (*id.* at 78a-80a). The FCC outlined the background of the Consultative Process, explaining that it "provides a valuable if not indispensable source of information * * * as to future foreign communications needs and the solutions to those needs that will be acceptable to other countries" (*id.* at 79a). By the same token, the FCC noted, the Consultative Process gave the attending Commissioners the opportunity "to explain and promote [the FCC's] statutory mandate" among foreign officials accustomed to legal and economic systems less procompetitive than ours. See *id.* at 81a-82a. This process "[wa]s not a process of negotiation," the Commission explained, because "it recognize[d] that each participant must independently adopt positions" in accordance with its domestic laws (*id.* at 82a). Yet to the extent that the informal discussions "result[ed] in a cooperative telecommunications climate" and "enhance[d] the prospect for foreign acceptance" of FCC-authorized services, the discussions advanced the FCC's "progress toward realization

³ ITT's proposed rules would require the FCC to publish 30 days' advance notice of all Consultative Process sessions and of the topics to be discussed there (J.A. 47). Any interested carrier could object to the scheduled topics, propose additional topics, and generally express its views (*id.* at 48). The Commission would be required to indicate its disposition of all comments received. All international discussions would have to be held on the record and be open to the public. And any interested party would be permitted to present its position, orally or in writing, at the Consultative Process. *Ibid.*

of [its] statutory goals [and were thus] a necessary and natural corollary of its international licensing authority" (*ibid.*).

Having decided that its Commissioners could properly take part in foreign discussions, the FCC rejected ITT's request for promulgation of procedural rules. ITT's proposed rules, the Commission noted, were largely based on the assumption that Consultative Process sessions were covered by the Sunshine Act, an assumption the Commission determined to be erroneous (Pet. App. 83a-84a). However, "recogniz[ing] and support[ing] the desirability of conducting its activities, both formal and informal, within public view," the Commission adopted notice and reporting procedures concerning its informal contacts with foreign administrators (*id.* at 84a).

4. While its rulemaking petition was pending (see Pet. App. 12a), ITT filed suit against the Commission in the United States District Court for the District of Columbia. One count of the complaint alleged that the Commissioners were acting ultra vires by engaging in impermissible "negotiations" at the Consultative Process (J.A. 63-69). Another count alleged that Consultative Process sessions were "meetings of [the FCC]" for purposes of the Sunshine Act, and that the Commission had violated the Act by excluding ITT and other carriers from them (*id.* at 69-71). In support of its motion for summary judgment on the latter count, ITT submitted a "Statement of Material Facts" (*id.* at 170-172) alleging that there were no material facts in dispute, and that ITT was entitled to summary judgment because it had been excluded from the Consultative Process and certain statements had been "made by the FCC and its representatives at, or with respect to," those sessions. ITT asked the court "to rely solely on [these] statements," which, in its view, established as a matter of law that "the FCC [was] engaged in the 'conduct or

disposition of official agency business'" at the Consultative Process (*id.* at 164).⁴

⁴ These statements, nine in number, included comments by the full Commission that participation in the Consultative Process flows from the FCC's "duty to authorize international [services] in the public interest" and that "these informal discussions * * * are a necessary and natural corollary of [its] international licensing authority" (J.A. 164-165); a statement by the FCC's General Counsel that "[t]he consultative process may provide a mechanism for increasing cooperation" in the area of new services (*id.* at 168); a comment by the chief of the FCC's Common Carrier Bureau that the Consultative Process was designed to facilitate "meaningful dialogue on matters of international scope" (*id.* at 169); a comment by Commissioner Fogarty that the FCC "really mean[t] business" in seeking to foster competition in overseas services (*id.* at 166); an observation by FCC Chairman Ferris, in colloquy with Senator Hollings at a Senate subcommittee hearing, that the FCC possessed some "leverage in international [facilities] planning" (*id.* at 167); an excerpt from a speech by Commissioner Fogarty in Montreal, Canada, urging foreign administrators to "recognize that [the FCC was] trying to promote competition," and describing the hoped-for European response as a "quid pro quo" (*id.* at 165-166); a comment by Commissioner Lee during an April 1980 FCC meeting that he "wouldn't object to having this very subject on an agenda * * * to see what [the Europeans] would be willing to bargain" (*id.* at 166); and a comment by Commissioner Washburn, during the same FCC meeting, opposing ITT's Sunshine Act request on the ground that public meetings inhibit frank discussion "when [one is] in a negotiating stance abroad" (*ibid.*). In the case of the latter two statements, the context makes clear that the "subject" Commissioner Lee was referring to was not new telecommunications services, but ITT's request that Consultative Process sessions be open to the public (see J.A. 161); and the context makes clear that Commissioner Washburn used the word "negotiating" in a colloquial sense to mean a frank exchange of views. See *id.* at 157-158. Indeed, the subsequent colloquy explicitly affirmed that Consultative Process discussions "are not for the purpose of negotiating operating agreements or entering into explicit tradeoffs with respect to one issue or another" (*id.* at 158).

The district court dismissed the ultra vires count for lack of jurisdiction (Pet. App. 61a-63a). The court "seriously doubt[ed]" that it had subject matter jurisdiction, noting that ITT "sought essentially the same relief in [the] rulemaking proceeding" and that under 47 U.S.C. 402(a) "[j]urisdiction over appeals from FCC orders rests exclusively in the Court of Appeals." Pet. App. 62a. The court saw no need to decide that question, however, because it concluded that ITT lacked standing and that the case was not ripe for review.⁵

The district court granted ITT's motion for summary judgment on the Sunshine Act count, holding that Consultative Process conferences are "meetings of [the FCC]" within the meaning of the Act. The court stated that the Commission "can[not] deny that FCC business is 'conducted'" at those sessions (Pet. App. 65a). The court also determined that the three attending Commissioners "ha[d] been delegated the authority to act for the FCC," asserting that "[i]t is beyond dispute that [they were] authorized to submit recommendations to the full Commission" and that "[i]t cannot be contested that the [Consultative Process] is designed to effectuate the decision-making process" (*id.* at 66a). The court enjoined the FCC to "comply with the * * * Sunshine Act * * * forthwith" (*id.* at 59a), although it stayed its order for three weeks to permit a previously scheduled Consultative Process session to be held in Madrid,

⁵ The district court construed ITT's ultra vires claim to be based on the Logan Act, 18 U.S.C. 953, which makes it a crime for unauthorized persons to negotiate with foreign governments, and held that the State Department alone has standing to complain of that statute's violation (Pet. App. 63a). The court also concluded that the ultra vires claim would not be ripe until the two new carriers had been accepted by foreign telecommunications agencies, at which time ITT could "object through the formal rulemaking process" (*ibid.*). The court of appeals reversed these two rulings (*id.* at 17a-21a). Neither is presented here.

Spain, provided that the session was "memorialized in transcript form" (*id.* at 68a).⁶

5. The court of appeals consolidated ITT's petition for review of the order denying rulemaking with cross-appals from the district court's judgment. It reversed the district court's dismissal of the *ultra vires* count (Pet. App. 13a-21a), reversed in part the FCC's denial of rulemaking (*id.* at 45a-53a), and held that the Sunshine Act applies to the Consultative Process (*id.* at 34a-45a).

a. Conceding that "[a] strong presumption against concurrent district court jurisdiction would be appropriate if the issues presented by ITT's rulemaking petition and its *ultra vires* count were indeed identical," the court of appeals determined that the issues were actually "very different" (Pet. App. 14a). Whereas the rulemaking petition, as the court of appeals read it, asked the FCC to declare "that 'negotiation' [was] outside the scope of [its] authority," ITT's *ultra vires* count alleged "that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so" (*ibid.*). The court viewed the rulemaking record as "manifestly inadequate" to permit appellate review and concluded that ITT's "colorable *ultra vires* claim can therefore be tested only through the kind of independent, *de novo* factfinding appropriate in the district court" (*id.* at 15a).

b. Again citing the "patent[] inadequa[cy]" of the record, the court of appeals reversed the Commission's denial of ITT's rulemaking petition (Pet. App. 48a). The court, however, declined to follow the "normal course" of simply remanding to the agency with instructions "to

⁶ ITT also sought disclosure under the FOIA of certain documents related to the Consultative Process (see Pet. App. 71a n.1). The district court ordered disclosure of the documents (*id.* at 63a-65a), but the court of appeals reversed as to all but two of them (*id.* at 21a-34a). The FOIA question is not presented here.

consider the issues further and develop an adequate record for judicial review," noting that it was remanding the *ultra vires* count to the district court with instructions to do precisely the same thing (*id.* at 51a). The court allowed that there might be some "tension in such a 'double remand.'" Indeed, it acknowledged that "the practical effect of [its] decision [was] fraught with the potential for duplication, conflicting resolutions, and further delay" (*ibid.*). Yet it concluded that these difficulties were "largely of the Commission's own making," and suggested that the FCC minimize them "through the simple expedient of staying further action on ITT's rulemaking petition pending the district court's resolution of the *ultra vires* issue" (*id.* at 51a-52a).

c. Turning to the Sunshine Act, the court of appeals held that Consultative Process sessions were "meetings of [the FCC]" as defined in 5 U.S.C. 552b. First, the court determined that the attending Commissioners were a "subdivision * * * authorized to act on behalf of the agency." 5 U.S.C. 552b(a)(1). The court acknowledged (Pet. App. 36a) that a subdivision of the FCC can properly be authorized to act on its behalf only by an express delegation of power pursuant to 47 U.S.C. 155(d)(1). The court likewise acknowledged (Pet. App. 36a) that no such delegation of power had been made to the Commissioners attending the Consultative Process. But the court inferred that such authority had nevertheless been granted—unofficially and in violation of the Communications Act—reasoning that the Commissioners attended "in their 'official roles,'" that "their goal [was] to build a 'consensus' that will 'lead ultimately to operating agreements for ITT's competitors,'" and that "they convey the information and views 'exchanged' at the meetings to the full Commission for its consideration" (*id.* at 37a).

The court of appeals also concluded that the Consultative Process discussions were "deliberations [that] de-

termine or result in the joint conduct or disposition of official [FCC] business." 5 U.S.C. 552b(a)(2). The court remarked (Pet. App. 37a) that the term "deliberations" might be "read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision," but it did not explain why it declined to adopt that reading or how the term could be read otherwise. The court relied heavily on a sentence in the legislative history of the Sunshine Act stating that the term "meeting" was meant to encompass "hearings and meetings with the public" (*id.* at 38a, quoting S. Rep. 94-354, *supra*, at 18), and concluded that the FCC "ha[d] advanced no reason to distinguish" Consultative Process discussions from such gatherings (Pet. App. 38a). Finally, the court deemed the Consultative Process to "involve[] agency business of the first import" because the information gathered there "is essential in [the FCC's] deliberations regarding the future structure of international communications" and because the sessions are designed to achieve a "'consensus' and 'favorable climate' with foreign administrations" on the subject of new services (*id.* at 39a).

SUMMARY OF ARGUMENT

I. Congress enacted the Sunshine Act to open agencies' "decisionmaking processes" to public view, yet at the same time to protect agencies' ability to discharge their regulatory responsibilities efficiently. That being Congress's goal, common sense suggests that the Act's open meeting rules should apply only to relatively formal sessions at which agency members with decisionmaking authority deliberate over concrete proposals for action and reach fairly firm views about the pending proposals. Common sense likewise suggests that the meetings at which these events occur must be conducted by the agency, for otherwise the agency would be in no position to ensure compliance with the Act's various strictures.

Happily, the statute's language and legislative history vindicate this common sense view. The Act applies only to "meeting[s] of an agency," as defined, and its openmeeting rules thus come into play only if a gathering satisfies four discrete tests. The people who attend must constitute a quorum of the agency or of a "subdivision authorized to act on [its] behalf." 5 U.S.C. 552b(a)(1). The attending members must engage in "deliberations," that is, "consideration and discussion of alternatives before reaching a decision." *Webster's New World Dictionary* 373 (2d college ed. 1974). The deliberations must "determine or result in the joint conduct or disposition of official agency business," that is, must involve "discussions which effectively predetermine official actions." S. Rep. 94-354, *supra*, at 19. And the "meeting" must be a "meeting of [the] agency," that is, must be run by the agency and be within its control.

The Consultative Process sessions did not satisfy any of these tests. First, the Commissioners who attended were neither a quorum of the FCC nor a quorum of a subdivision authorized to act on its behalf. Under the Communications Act, the Commission may authorize a subdivision to act on its behalf only by a formal delegation of power, and it is conceded that no such delegation was effected here. Second, the Consultative Process discussions did not constitute "deliberations," for they involved, not a formal evaluation of concrete proposals, but an informal exchange of views on extremely general topics, and had no relationship to any FCC decision, pending or prospective. Third, the discussions did not "predetermine official actions," both because they did not involve any matter pending or likely to arise before the FCC, and because, given their informal nature, they could not have caused the attending Commissioners' views on any issue to become "fixed." Finally, even if the Consultative Process sessions were "meetings," they were not "meetings of [the FCC]." The confer-

ences were held on foreign soil, hosted by foreign officials, and attended by foreign representatives who outnumbered the Commissioners and equalled them in rank. Under these circumstances, the attending Commissioners were in no position to dictate the terms of the gatherings, to decide unilaterally whether they would be open to the public, or to decree that they be governed by United States law. Faced with foreign objections to American open-meeting rules, the Commissioners would have been forced to choose between foregoing the meetings or violating the Sunshine Act, a Hobson's choice that Congress cannot possibly have envisioned.

II. The court of appeals likewise erred in sustaining district court jurisdiction of ITT's ultra vires claim. ITT presented a substantially identical ultra vires argument to the FCC, and the Commission fully addressed that argument in its order denying rulemaking. It is horn-book administrative law that review of the FCC's order was committed exclusively to the court of appeals. In holding otherwise, the court below has licensed collateral attacks on agency orders, in contravention of this Court's decisions, that will seriously disrupt the administrative process.

ARGUMENT

I. THE CONSULTATIVE PROCESS SESSIONS WERE NOT MEETINGS OF THE FCC, AND THUS WERE NOT SUBJECT TO THE SUNSHINE ACT'S OPEN MEETING REQUIREMENTS

In passing the Sunshine Act, Congress struck a balance between two principles. On the one hand, it declared that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government." Pub. L. No. 94-409, § 2, 90 Stat. 1241. On the other hand, it stressed that enhanced public access must be accomplished "while protecting * * * the ability of the Government to carry out

its responsibilities" (*ibid.*). Congress endeavored to accommodate these principles by crafting detailed definitions of the Act's operative terms. These definitions, like those contained in the Freedom of Information Act, indicate that, while "Congress undoubtedly sought to expand public rights of access to Government information[,] * * * that expansion was a finite one." *Forsham v. Harris*, 445 U.S. 169, 178 (1980). The question presented here, accordingly, is not to be resolved, as the court of appeals evidently believed, by generalized incantations about the Act's "broad sweep" (Pet. App. 39a, 44a) or its "presumption of openness" (*id.* at 40a, 42a, 43a, 44a). The Sunshine Act "sweeps" only as broadly as its words, construed in light of English usage and legislative intent, permit.

The Sunshine Act applies to "meeting[s] of an agency." 5 U.S.C. 552b. It defines "agency" to mean a "collegial body" consisting of two or more presidential appointees, including "any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. 552b(a)(1). It defines "meeting" to mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. 552b(a)(2). Thus, a gathering attended by agency members is covered by the Sunshine Act only if four distinct elements are present: (1) the attending members must constitute a quorum of the full agency or of a "subdivision thereof authorized to act on behalf of the agency"; (2) the attending members must engage in "deliberations"; (3) the deliberations must "determine or result in the joint conduct or disposition of official agency business"; and (4) the gathering must be a "meeting of [the] agency." Absent any one of these elements, the Sunshine Act's openmeeting rules do not apply. Not one of these prerequisites was met here.

A. The Consultative Process sessions were attended neither by a quorum of the FCC nor by a quorum of a subdivision authorized to act on its behalf

1. It is undisputed that a "quorum" of the Commission—*i.e.*, "the number of individual [FCC] members required to take action on [its] behalf"—was not present at any Consultative Process discussion. At all relevant times, the Commission had seven members, and a quorum was four. 47 U.S.C. 154(h).⁷ No more than three Commissioners, however, ever participated in the Consultative Process. As the court of appeals noted (Pet. App. 2a, 36a), the three attending Commissioners were also members of, and represented a quorum of, the "Telecommunications Committee," which is a subdivision of the FCC. But it is clear that these Commissioners were not "authorized to act on behalf of the [FCC]" at those gatherings.

The Communications Act permits the Commission to delegate certain of its functions to a "panel of commissioners [or] an individual commissioner." 47 U.S.C. 155(d)(1).⁸ Such delegation of authority may be made only "by published rule or by order," and "[a]ny such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office" (*ibid.*). The Telecommunications Committee is one of the FCC's two standing committees (47 C.F.R. 0.4). The Commission by rule has delegated specific, limited functions to that Committee, *i.e.*, the authority to act upon applications by common carriers for certificates of public convenience (47 U.S.C. 214) and the authority to act upon certain

⁷ Effective July 1, 1983, the Commission's membership was reduced to five, thus reducing the size of a quorum from four to three. Pub. L. No. 97-253, tit. V, § 501(b), 96 Stat. 805.

⁸ Section 155(d)(1) was renumbered as Section 155(c)(1) in 1982. See Pub. L. No. 97-259, § 105(b), 96 Stat. 1091 (to be codified at 47 U.S.C. 155(c)(1)).

applications for radio construction permits (47 U.S.C. 319). See 47 C.F.R. 0.215. It has never been suggested that the attending Commissioners performed either of these functions at the Consultative Process. Nor has the FCC, "by published rule or by order," delegated the Telecommunications Committee authority to perform any other function there. The attending Commissioners, therefore, having received no delegation of authority under 47 U.S.C. 155(d)(1), were not "authorized to act on behalf of the [Commission]" at those sessions, and, had they purported so to act, their actions would have been void.

2. The court of appeals, while acknowledging that the attending Commissioners had received no express delegation of authority, nevertheless concluded (Pet. App. 36a) that the Commission had conferred such authorization unofficially. The court inferred a sub rosa delegation of authority from the facts that the Commissioners attended in their "official roles," that their goal was to "build a 'consensus,'" and that they "convey[ed] the information and views 'exchanged'" to the full Commission upon their return (*id.* at 36a-37a). This reasoning cannot withstand analysis.

a. To begin with, the court of appeals cited no authority (and we know of none) for the proposition that, where there exists an express "delegation of powers" provision in an agency's organic statute, the agency may nevertheless authorize members to act on its behalf by informal and unofficial means. Indeed, the court of appeals assumed (Pet. App. 36a) that the FCC had conferred the supposed "authorization" illegally, and proceeded to direct that the attending Commissioners henceforth play their role in the Consultative Process "only pursuant to a proper and precise delegation of authority from the Commission" (*id.* at 53a). The court of appeals' assumption of an illegal delegation, based entirely on inference, is wholly contrary to the presump-

tion of regularity normally accorded agency action. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

b. Even if an unofficial delegation of authority were possible under the Communications Act, the language and operation of the Sunshine Act indicate that a "subdivision" is not "authorized to act on behalf of the agency"⁹ absent officially delegated power. The word "subdivision" connotes a body that has been officially created and that has well-defined duties. Indeed, a leading treatise on the Sunshine Act concludes that, "[a]t a minimum, a subdivision must have a specified membership and fixed responsibilities; an informal working group authorized to report back to the body is not a subdivision." R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act 3* (1978) (hereinafter cited as *Interpretive Guide*). Because the term "subdivision" betokens a reasonable level of formality, its use presupposes an official delegation of power.

The quorum requirement likewise suggests that a "subdivision" must be an entity empowered to take official action capable of binding the agency, rather than a loose group informally assigned to assist it in some way. A quorum, obviously, is not necessary to perform duties of the latter sort, and it is difficult to see why Congress included the quorum rule if it intended the

⁹ Earlier versions of the Sunshine Act, like the version enacted, required that a subdivision be "authorized to act on behalf of the agency" before a "meeting" could occur. Both bills before the Conference Committee contained this requirement. See S.5, 94th Cong., 1st Sess. § 4(a) (1975); H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(1) (1976). Previous drafts did the same. See, e.g., H.R. 5075, 94th Cong., 1st Sess. § 4(a) (1975); H.R. 9868, 94th Cong., 1st Sess. § 4(a) (1975). The legislative history nowhere discusses the meaning of this phrase.

Act to cover groups that discharge only such tasks. Rather, a quorum is needed to take formal action that at some stage will require a vote. The quorum requirement thus makes perfect sense if the Act is construed to reach only those agency subdivisions possessing officially delegated powers.

The "collegiality" requirement, finally, militates against the court of appeals' "informal authorization" theory. For Sunshine Act purposes, a "subdivision," like its parent agency, must function as a "collegial body." See *Interpretive Guide* 3. A "collegial" body is one "with authority or power shared equally among colleagues." *Webster's New World Dictionary* 279 (2d college ed. 1974). Agency members act "collegially" when they debate and vote on proposals with the majority view prevailing, actions of the sort for which an official delegation of authority is needed. It is hard to see how agency members act "collegially" when they attend an informal gathering in Europe and report on what they heard. Such action is not predicated on an "equal sharing" of power; indeed, it has nothing to do with the exercise of power at all.¹⁰

¹⁰ In holding that "unofficial authorization" sufficed, the court of appeals reasoned (Pet. App. 36a) that "[t]he applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will." This reasoning is spurious. An agency will have little incentive to make improper delegations of power, since, if its members purport to take official action in reliance thereon, their actions will be void and may be set aside. On the other hand, if the "unofficially authorized" members do not purport to take official action, but merely assist the agency informally in some way, any official action subsequently taken will be fully subject to the Sunshine Act's constraints. Besides, an agency willing to delegate authority to escape the Act's strictures need not resort to the sort of skulduggery hypothesized by the court of appeals, for agencies have at their disposal perfectly legal methods of accomplishing that result. The agency,

c. Even if an informal delegation of authority were sufficient for Sunshine Act purposes, the court of appeals offered no convincing explanation of what it was that the attending Commissioners were unofficially authorized to do. ITT consistently has asserted that the Commissioners were "negotiating" with their European counterparts. All parties to the case agree, however, that the FCC has no authority to "negotiate" with foreign governments (see page 6, *supra*), and an agency obviously cannot delegate authority that it does not possess. The Commission (Pet. App. 80a & n.5, 83a; J.A. 121-122) and the attending Commissioners (J.A. 175) repeatedly stated that the latter were not authorized to act for the FCC in any way, but the court of appeals dismissed these averments as "vague" and "conclusory" (Pet. App. 45a n.179). The court noted (*id.* at 36a-37a) that the Commissioners attended in their "official roles" and sought to "build a 'consensus,'" but it is hard to construe this as "taking action on behalf of the FCC." At bottom, the court of appeals seems to have based its inference of unofficial authorization on the fact that the attending Commissioners "convey the information and views 'exchanged' at the [Consultative Proc-

for example, could authorize a single member to act on its behalf. See 5 U.S.C. 552b(a)(2) (defining "meeting" to mean "the joint conduct" of agency business); S. Rep. 94-354, *supra*, at 17 (indicating that the Act does not apply where only one agency member is present). Cf. 47 U.S.C. 155(d)(1) (permitting FCC to "delegate any of its functions * * * to * * * an individual Commissioner"). Or the agency could authorize employees, rather than members, to act for it. See 5 U.S.C. 552b(a)(1) & (2) (defining "agency" as a collegial body headed by "two or more * * * members" appointed by the President, and defining "meeting" as the deliberations of a quorum of "members"). Cf. 47 U.S.C. 155(d)(1) (permitting FCC to "delegate any of its functions * * * to * * * an employee board, or an individual employee"). While Congress recognized such possibilities (see S. Rep. 94-354, *supra*, at 17), it chose not to make the Act's coverage absurdly broad solely to preclude all chance of avoidance.

ess] to the full Commission for its consideration" (*id.* at 37a). The legislative history plainly shows, however, that this does not constitute "act[ion] on behalf of the [FCC]" either.

Congress frequently manifested its understanding that a "subdivision" for Sunshine Act purposes "need not have authority to take agency action which is final in nature." S. Rep. 94-354, *supra*, at 17. "It is not sufficient for the purposes of open government," the Senate Report explained, merely to "have the public witness final agency votes," or to have open meetings be "reruns staged for the public after agency members have discussed the issue in private and determined their views." *Id.* at 18. The Report accordingly says that "[p]anel[s] or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required * * * to open their meetings to the public." *Id.* at 17. *Accord*, H.R. Rep. 94-880 (Pt. I), 94th Cong., 2d Sess. 7 (1976).

The district court (Pet. App. 66a) and the court of appeals (*id.* at 39a) seized upon this language to support an inference of delegation, on the theory that the attending Commissioners were "authorized to submit recommendations" to the FCC. But it seems clear that the Senate Report, in referring to "submi[ssion of] recommendations," had more in mind than "conveyance of information and views." The Report speaks of subdivisions authorized "to conduct hearings" and "to submit recommendations, preliminary decisions, or the like." The conduct of hearings and the submission of preliminary decisions are well-recognized forms of agency action, and both possess a high degree of formality. Employing the principle of *noscitur a sociis* (see *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 475, 487-488 (1979)), it would seem that "submit-

[ting] recommendations" likewise denotes a step more formal than simply "coming back and telling the Commission what happened." Indeed, the leading treatise on the Sunshine Act concludes that, "where a committee of members has been directed to draw up and submit an informal recommendation to the full collegial body, which recommendation is then open to full consideration by the body, it is hard to regard such an assignment as an authorization to act on behalf of the agency in any meaningful sense." *Interpretive Guide* 2-3. See *id.* at 3 (concluding that "an informal working group authorized to report back to the [agency]" is not a subdivision authorized to act on its behalf).

By basing an inference that the attending Commissioners were "unofficially authorized" to act for the FCC on a finding that "they convey the information and views 'exchanged' * * * to the full Commission" (Pet. App. 37a), the court of appeals has twisted both the legislative history and the English language out of recognizable shape. Authorization "to act on behalf of an agency" means more than to "be present," to "discuss agency matters," or to "report what transpired." If it did not, agency members would be deemed to have "acted on behalf of the agency" each time they went to a lecture, attended a briefing session, or participated in a continuing legal education seminar. High-level government officials have a duty to educate themselves about their work, and Congress can scarcely have intended that the Sunshine Act will apply—without more—unless they remain mute about what they learn.

d. Finally, the court of appeals' "unofficial delegation" theory portends practical problems of no small scope. If the Sunshine Act were satisfied by unofficial authorization or by authorization in contravention of governing statutes and rules, a colorable open-meeting claim could be asserted when agency members engage in any activity related to their regulatory tasks. Per-

sons asserting claims of sub rosa authorization would predictably demand the right to discover all information bearing on the question, and such evidentiary proceedings would obviously create potential for harassment and interference with the agency's proper functioning. Such a doctrine, moreover, would make it impossible to administer the Sunshine Act in accord with Congress's intent. The statute, with its requirements that the time, place, subject matter, and open-or-closed status of a meeting be announced *in advance*, is predicated on the assumption that an agency can know ahead of time whether a gathering will be a "meeting" or not. If this determination hinges on an appellate court's inference about whether attending members, despite their repeated protestations to the contrary, have been endowed with sub rosa delegations of authority, the Act's prospective rules will be unadministrable.

B. The Consultative Process sessions did not involve "deliberations"

The Sunshine Act defines "meeting" to mean "the deliberations" of a quorum. 5 U.S.C. 552b(a)(2). The court of appeals itself suggested a useful definition of the word "deliberations," explaining (Pet. App. 37a) that it might be read "to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency." The court refused to adopt that construction, or to propose any other, and declined to explain why. Yet the language and legislative history of the statute show that the reading the court rejected is correct.

The word "deliberations" is defined as "consideration and discussion of alternatives before reaching a decision." *Webster's New World Dictionary* 373 (2d college ed. 1974); see *Black's Law Dictionary* 384 (5th ed. 1970). As used in the Sunshine Act, the term presupposes a "discussion which is sufficiently focused on discrete proposals or issues" to cause participants to form

reasonably firm views (*Interpretive Guide* 9). The term thus excludes the furnishing of information or the exchange of views when no concrete proposal is presented for decision.

The evolution of the statute's language shows that "deliberations" should be read in this narrow, dictionary sense. The House bill, as reported by the Judiciary Committee, defined "meeting" as "an assembly or simultaneous communication" concerning agency business. H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(2) (1976). The definition was amended on the floor to read, "a gathering to jointly conduct * * * agency business," and passed the House in that form. 122 Cong. Rec. 24203 (1976). The Senate bill originally defined "meeting" as "any procedure by which official agency business is considered or discussed." S. 5, 94th Cong., 1st Sess. § 201(a) (1975); see 121 Cong. Rec. 244 (1975). The definition was subsequently revised to read, "a gathering, electronically or in person, [which] results in the consideration" of agency business. S. 5, § 201(a), S. Comm. Print No. 2, 94th Cong., 1st Sess. (1975). As reported by the Senate Government Operations Committee, however, the definition was amended to read much as it now does, i.e., "the *deliberations* of [a quorum] where such *deliberations* concern the joint conduct or disposition of official agency business." S. 5, 94th Cong., 1st Sess. § 201(a) (1975) (emphasis added). The Senate Report explained that this redrafting was designed "to exclude many discussions which are informal in nature." S. Rep. 94-354, *supra*, at 10. Indeed, the Report states (*id.* at 18) that the word "deliberations" was "carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of [the Act]." The Conference Report, with a modification not relevant here, adopted "the Senate definition, as explained in the Senate report." S. Conf. Rep. 94-1178, 94th Cong., 2d Sess. 11

(1976). In consciously choosing the word "deliberations" in lieu of words like "gathering," "assembly," "procedure," or "communication," Congress surely suggested that the term should be construed, in the court of appeals' words, "to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency."¹¹

The Consultative Process discussions, as the court below recognized, cannot possibly be held to constitute "deliberations" under this standard. Those talks consisted, not of a formal evaluation of concrete proposals, but of an informal exchange of views on extremely general subjects. See pages 4-5, *supra*. The information the Commissioners gathered did not precede, and had no relationship to, any formal decision, pending or prospective.¹² Indeed, to the extent that the Consulta-

¹¹ The use of the term "deliberations" elsewhere in the Sunshine Act is consistent with this conclusion. The Act provides (5 U.S.C. 552b(a)(2)) that "the term 'meeting' means * * * deliberations * * *, but does not include deliberations required or permitted by subsection (d) or (e)." The "deliberations" referred to in subsections (d) and (e), significantly, are all of a formal, evaluative, decision-oriented sort. See, *e.g.*, 5 U.S.C. 552b(d)(1) (providing that an agency may close a meeting "only when a majority * * * votes to take such action," and specifying the procedure for such vote); 5 U.S.C. 552b(d)(2) (providing that, upon request of an interested party, "the agency * * * shall vote by recorded vote whether to close" a meeting); 5 U.S.C. 552b(d)(4) (stating that an agency "may provide by regulation" for the closing of certain meetings); 5 U.S.C. 552b(e)(2) (providing that an agency may change a meeting's format only if it "determines by a recorded vote that agency business so requires").

¹² The court of appeals suggested that the information gathered at the Consultative Process "is essential in [the FCC's] deliberations regarding the future structure of international telecommunications" (Pet. App. 39a). But the fact that an event furnishes information useful in *future* deliberations does not mean that the event *itself* involves deliberations. Reading docu-

tive Process related to any FCC decision at all, it related to the Telenet and Graphnet decisions that the Commission had already made, decisions whose procompetitive rationale the attending Commissioners sought to explain, and whose procompetitive effects they urged their foreign counterparts to help realize.

C. The Consultative Process sessions did not "determine or result in the joint conduct or disposition of official agency business"

The Sunshine Act defines "meeting" to include agency deliberations only "where such deliberations determine or result in the joint conduct or disposition of official agency business." The legislative history (see page 22, *supra*) makes clear that the reach of this language is not confined to gatherings at which final votes are taken. Yet it is equally clear that its reach does not extend to informal sessions, like those involved here, where agency business is simply discussed.

1. The evolution of the statutory language reveals a deliberate effort by Congress to narrow the categories of gatherings subject to the Act's openmeeting rules. The Senate bill, as passed by that chamber, covered deliberations that "concern the joint conduct or disposition of official agency business." S. 5, 94th Cong., 1st Sess. § 4(a) (1975). Early versions of the House bill read the same. See, *e.g.*, H.R. 9868, 94th Cong., 1st Sess. § 4(a) (1975); H.R. 10315, 94th Cong., 1st Sess. § 552b(a)(2) (1975). The House Government Operations Committee, however, amended the formula by omitting the word "official." H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(2) (1976). The Judiciary Committee followed suit. H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(2) (1976). Representative Horton noted that this omission

ments or inspecting facilities may also furnish such information, but those activities can hardly be termed "deliberations."

had the effect of "immediately broaden[ing] the range of member conversations which [the bill] covered." 122 Cong. Rec. 24203 (1976). The definition was somewhat tightened on the floor by defining "meetings" with reference to their purpose, but in the definition as it passed the House—"a gathering to jointly conduct or dispose of agency business"—the word "official" was still left out. 122 Cong. Rec. 24203 (1976).

The Conference Report adopted the Senate definition, with its "official business" gloss, but made one significant modification. Whereas S. 5 had referred to deliberations that "*concern* the joint conduct or disposition of official agency business," the statute as enacted refers to deliberations that "*determine or result in* the joint conduct or disposition of official agency business." The Conference Report highlights, but does not explain, this change. See S. Conf. Rep. 94-1178, *supra*, at 11. Representative Fascell, however, a member of the Conference Committee and one of the bill's chief sponsors, said that the substituted language was "intended to permit casual discussions between agency members that might invoke the bill's requirements under the less formal 'concern' standard." 122 Cong. Rec. 28474 (1976). See *Interpretive Guide* 7 (noting that the substituted language "can only be interpreted as intending some limiting and narrowing effect").

2. The committee reports show that Congress, in restricting the definition of "meeting" to deliberations that *determine or result in* the conduct or disposition of official agency business, intended to reach only formal sessions where members' positions on a matter become fixed. The Senate Report states that the key consideration is whether "agency members have discussed the issue * * * and *predetermined* their views," that an agency's deliberations "cross over the line" and become a "meeting" when members "engage in discussions

which effectively *predetermine* official actions." S. Rep. 94-354, *supra*, at 18, 19 (emphasis added). A leading treatise on the Sunshine Act likewise concludes that "the controlling distinction is between discussions which 'effectively predetermine official actions' and those which do not." *Interpretive Guide* 6. See *id.* at 8.

At the same time, the legislative history shows that informal, exploratory talks are outside the Act's scope. The Senate Report says that "meetings" exclude "informal and preliminary" discussions, and that "[i]t [was] not the intent of the bill to prevent * * * agency members * * * from engaging in informal background discussions which clarify issues and expose varying views." S. Rep. 94-354, *supra*, at 19.¹³ The test is whether the discussion is "decision-oriented," that is, "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." *Interpretive Guide* 9 & n.16.

3. There can be little question that the Consultative Process discussions did not constitute "meetings" under this standard. It is no doubt true, in the court of appeals' words (Pet. App. 38a), that the discussions "involve[d] agency business," in the sense that the Commissioners attended as Commissioners, rather than as tourists, and that they broached matters of importance to the FCC. But it is not sufficient that discussions "involve" or "concern" agency business. The statute says

¹³ The quoted passage makes this point (S. Rep. 94-354, *supra*, at 19) by reference to a three-member agency, but "the passage necessarily has broader application, since there is nothing in the statute which supports a special definition of 'meeting' for agencies where two members make up a quorum." *Interpretive Guide* 6. The court of appeals (Pet. App. 41a n.163) so understood the passage.

that they must “determine or result in the joint conduct or disposition of official agency business.”

The Consultative Process discussions did not do that. The court below did not identify any action of the FCC, or any position of its individual Commissioners, that became “predetermined” or “fixed” at those gatherings. Nor did the court find the discussions to have focused on any concrete proposal pending or likely to arise before the agency. Rather, the Consultative Process sessions involved precisely the sort of “informal background discussions” that, according to the Senate Report, the Sunshine Act was not meant to cover. Those attending the gatherings constantly referred to—indeed, repeatedly insisted upon—the sessions’ “informality.” See pages 4-5, *supra*. And, to the extent that the Commissioners sought the views of foreign administrations, it was as a background for future FCC decisionmaking, decisionmaking that would in the normal course itself be subject to the Act’s openmeeting rules.

4. In support of its conclusion that the Consultative Process “determined or resulted in the joint conduct or disposition of official [FCC] business,” the court of appeals asserted that “[t]hese encounters play an integral role in the Commission’s policymaking processes in at least two ways” (Pet. App. 38a). First, the court observed (*id.* at 38a-39a) that “the meetings are an important means for gathering information and opinions from foreign administrations” and that this information would be useful in future FCC deliberations. This observation, while correct, is irrelevant to the proposition the court set out to prove. The fact that discussions yield useful data for future decisionmaking—“informal background discussions” do just that—does not mean that they “effectively predetermine official actions” (S. Rep. 94-354, *supra*, at 19).

Second, the court of appeals found (Pet. App. 39a) that the FCC had chosen the Consultative Process “as

the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements." However, assuming arguendo the accuracy of this finding, such efforts on the part of the attending Commissioners did not "predetermine" any FCC position or relate to any matter pending or likely to arise before it, since the Commission had already issued final decisions authorizing Graphnet and Telenet to enter the trans-Atlantic market.¹⁴ Rather, the Commissioners sought merely to explain the basis for, and thus facilitate the implementation of, decisions the FCC had previously made. Although the court of appeals believed that the "broad sweep of the Sunshine Act does not support a distinction between an agency's *predecisional* activities and its *postdecisional* efforts to implement, interpret, and

¹⁴ In its Brief in Opposition, ITT asserts (at 23 & n.17) that the Consultative Process discussions may have touched on at least one matter that was "likely to arise before" the FCC, since, under the terms of the Commission's authorizations to Telenet and Graphnet (see *ITT World Communications*, 595 F.2d at 902), any operating agreements they reached with European administrations would "require [FCC] approval." This assertion is misleading. The Commission in authorizing Telenet and Graphnet did conclude that its "regulatory needs [could] be adequately satisfied by conditioning [their] authorizations [on] the execution and filing of satisfactory agreements prior to initiation of these services, rather than prior to their authorization." 63 F.C.C.2d at 408. The filing of such agreements, however, was merely a reporting requirement, not a substantive condition of licensing (*In re International Relay, Inc.*, 77 F.C.C.2d 819, 826 (1980)), and in reviewing the agreements the FCC would be performing only a routine oversight function. (The Commission has since eliminated, effective May 1980, the requirement that operating agreements be filed prior to the carrier's commencing service (77 F.C.C.2d at 825-828)). At all events, any link between the generalized discussion of "new carriers and services" held at the Consultative Process, and the particularized terms of hypothetical operating agreements foreign administrations might sign with Telenet or Graphnet, was utterly remote and speculative.

promote its policies" (Pet. App. 39a), that belief was ill-founded. The goal of the Sunshine Act, as expressed in its preamble, was to give the public the fullest practicable information about "the decisionmaking processes" of the government. Pub. L. No. 94-409, § 2, 90 Stat. 1241. The legislative history consistently echoes this theme. See, e.g., S. Rep. 94-354, *supra*, at 11, 17, 18. One does not need a dictionary to recognize that "postdecisional" efforts to explain a decision are not part of "the decisionmaking process." See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975).

5. Finally, the court of appeals (Pet. App. 38a) sought support in the legislative history for its conclusion that the Consultative Process "determined or resulted in the joint conduct or disposition of official [FCC] business." Both the Senate and House Reports state that panels authorized "to conduct hearings on behalf of the agency" must open their meetings to the public. See page 22, *supra*. And the Senate Report says that, "[i]n addition to business meetings of the agency, [the term 'meeting'] includes hearings and meetings with the public." S. Rep. 94-354, *supra*, at 18. The court of appeals cited these three passages and held that the FCC "ha[d] advanced no reason to distinguish the [Consultative Process discussions] from 'hearings' or 'meetings with the public'" (Pet. App. 38a).

The court of appeals "read too much into these scattered bits of legislative history." *Pennhurst State School v. Halderman*, 451 U.S. 1, 20 (1981). To begin with, there is a vast difference between "agency hearings" and the international consultations involved here. Hearings are usually formal, focus upon a particular problem or proposal, and are generally open to the pub-

lic.¹⁵ Earlier drafts of the Sunshine Act had defined "meeting" explicitly to include "meetings to conduct hearings,"¹⁶ and both Reports suggest (see pages 22-23, *supra*) that the "conduct of hearings" should be read in *pari materia* with "the submission of preliminary decisions," *i.e.*, as exemplifying formal and decision-oriented agency action.

Nor does the statement that "meeting" includes "meetings with the public" justify the court of appeals' result. The court viewed that statement (see *Pet. App.* 42a-43a) as establishing a virtual *per se* rule that discussions with outsiders are "meetings" for Sunshine Act purposes. That plainly was not the intendment of the Senate Report. The Report surely meant to signify no more in the quoted passage than it did in a passage three pages earlier, where it stated that "meeting" includes "meetings of [an agency] when agency staff or outside individuals *are also present*." *S. Rep.* 94-354, *supra*, at 15 (emphasis added). Both passages indicate (quite properly) that, if an agency gathering otherwise qualifies as a "meeting" under Section 552b(a)(2), the "meeting" is no less a "meeting" because outside parties happen to be there. The passages cannot be read to suggest that the attendance *vel non* of outside parties is a relevant consideration in determining whether the gathering is a "meeting" to begin with. Indeed, any such suggestion would contradict Section 552b(a)(2), which says that the only persons whose attendance is relevant are "agency members."

¹⁵ See, *e.g.*, 47 U.S.C. 154(j) (FCC hearings open to the public upon request, but may be closed to protect secret national defense information); cf. 5 U.S.C. 552b(c)(1) (Sunshine Act exception for similar information).

¹⁶ See, *e.g.*, S. 3881, 92d Cong., 2d Sess. § 1(a) (1972); S. 261, 93d Cong., 1st Sess. § 201(a) (1973); S. 5, 94th Cong., 1st Sess. § 201(a) (1975); H.R. 5075, 94th Cong., 1st Sess. § 4(a) (1975).

D. The Consultative Process sessions were not "meetings of the FCC"

The Sunshine Act's open-meeting requirements apply only to "meeting[s] of an agency" (5 U.S.C. 552b(b)). Even if the Consultative Process sessions were "meetings," therefore, they would not be covered by the Act unless they were also shown to be "meetings of [the FCC]." The circumstances under which the sessions were held make it clear that they cannot be so denominated.

The structure of the Sunshine Act shows that a meeting does not become a "meeting of [the] agency" merely because some agency members happen to be present. Rather, the Act's operative provisions uniformly proceed on the assumption that "an agency meeting" (5 U.S.C. 552b(c)) is a meeting that is run by, and under the control of, the agency in question. The procedures for closing a meeting, for example, presume that the agency is in a position unilaterally to decide, "by recorded vote," whether the meeting will be open to the public (5 U.S.C. 552b(d)(1) and (2)). The Act permits an agency to "provide by regulation for the closing of [certain] meetings," evidently assuming that the agency's regulations will bind all concerned (5 U.S.C. 552b(c)(4)). The Act's notice provisions are predicated on the assumption that the agency is in a position to prescribe the meeting's time, place, and subject matter, and to dictate any changes therein "by a recorded vote," solely by reference to whether "agency business so requires" (5 U.S.C. 552b(e)(1) and (2)). The Act states that "[t]he agency shall make promptly available to the public" the transcript of any closed meeting, evidently assuming that the agency has discretion to make such disclosure unilaterally (5 U.S.C. 552b(f)(2)). And the Act assumes that the "presiding officer" of the meeting will be an agency member (5 U.S.C. 552b(f)(1)).

The Consultative Process sessions were plainly not run by the attending Commissioners or within their unilateral control. Those sessions were hosted by foreign governments and were held on foreign soil. They were variously attended by representatives of six or more foreign countries. The foreign attendees were officials of national telecommunications agencies; they outnumbered the attending Commissioners and equalled them in rank. Under these circumstances, the attending Commissioners were in no position to decide unilaterally whether the sessions would be open or closed, to decree that the sessions would be governed by FCC regulations, or to dictate changes in their format as "[FCC] business * * * require[d]." Indeed, any such attempt would have implied that the gatherings were subject to American regulatory constraints, whereas the whole point of the Consultative Process was to enable "foreign entities [to] participate without being subjected 'to U.S. regulatory jurisdiction in fact or appearance.'" Pet. App. 79a, quoting *In re AT&T Co.*, 73 F.C.C.2d 248, 254 (1979). Faced with foreign objections, the Commissioners would have had to choose between forgoing the sessions or violating the Sunshine Act. This Hobson's choice would in effect have converted the Act's procedural rules into a substantive restriction on FCC action, contrary to Congress's explicit intent not to "change[] the substantive laws governing * * * any agency." S. Rep. 94-354, *supra*, at 1.

Common sense likewise suggests that international meetings attended by representatives of this country are not "meetings of [the] agency" in question. Congress surely recognized that foreign nations' progress toward "government in the sunshine" was less precipitous than ours, and surely realized that foreign officials would bristle at being subjected to such peculiarly American rules. Congress generally acts circumspectly

when extending the jurisdiction of our laws extraterritorially, and there is nothing in the statute or its legislative history to suggest such a design here. The exceptions to the Act's openmeeting requirements are couched in terms of United States law (see, *e.g.*, 5 U.S.C. 552b(c)(1), (3) and (10)), and would thus prevent foreign participants from demanding closure of a session, even though they might allege policy grounds identical to those underlying the statutory exceptions. These considerations counsel against regarding the Dublin, Ascot, and Madrid multinational gatherings as "meetings of the FCC."¹⁷

Finally, strong considerations of policy and practicality militate against the court of appeals' result. Its decision, taken as a whole, gives the words "meeting of an agency" no coherent denotation. In limiting the term only by such vague strictures as the requirement that discussions "involve agency business of the first import" or "play an integral role in the [agency's] policy-making processes" (Pet. App. 38a), the opinion gives the courts vast, *ad hoc* discretion to expand the Act's

¹⁷ It is of course true, as the court below noted, that "the mere setting of a gathering is not determinative" of its status as a Sunshine Act "meeting" (Pet. App. 40a n.158, quoting S. Rep. 94-354, *supra*, at 18). The Senate Report indicates that "[d]iscussions held in the board room or the Chairman's office are not the only gatherings covered," and that "[c]onference telephone calls and meetings outside the agency are equally subject to the bill if they * * * meet the requirements of this subsection." S. Rep. 94-354, *supra*, at 18-19. But we are not contending that the geographical location of the Consultative Process sessions, *per se*, put them outside the Act's scope. We submit, rather, that the totality of the circumstances under which the sessions were held—including the facts that they took place outside U.S. regulatory jurisdiction and were attended by foreign officials who outnumbered and had equal status with the attending FCC members—shows that the sessions could not have been controlled by, and were thus not "meetings of," the agency.

coverage in unpredictable ways. A "meeting" will be deemed to have occurred whenever a court concludes that something meaningful was said.

More importantly, the decision below will severely impede agency consultations with their foreign counterparts, in defiance of Congress's intention that the Sunshine Act not impose substantive restrictions on agency action. Rapid technological advances have heightened the need for international coordination in many regulatory fields, from banking and telecommunications to shipping and aviation. Such coordination demands that administrators from different countries understand each other's objectives and strategies, as well as the technical, economic, legal and political constraints under which they work. This mutual understanding is often achieved best through face-to-face conferences at which officials engage in free-wheeling, wide-ranging, and informal discussions. If such gatherings must be open to the public, be recorded or transcribed, and be governed by a formal agenda, their utility—assuming that foreign representatives are willing to participate at all—will be greatly reduced.¹⁸ This will not mean more government in the sunshine. It will mean more global misunderstanding and less effective regulatory coordi-

¹⁸ As noted above (see pages 10-11, *supra*), the October 1980 Consultative Process session, held in Madrid, was taped pursuant to the district court's order. The European attendees objected strenuously (J.A. 177), and the gathering proved far less useful than its predecessors, with the Europeans abstaining from candid discussion and "confin[ing] themselves instead to listening to the U.S. statement of position" (*id.* at 178). Although the Consultative Process has not been terminated entirely (see ITT's Br. in Opp. 13), sessions held since Madrid have dealt only with facilities planning, to the exclusion of the topics—new carriers and services, and the desirability of increased competition—that were added to the agenda at Dublin. The decisions below, in short, have caused cessation of the discussions that gave rise to this litigation.

nation. No one will benefit, except regulatees like respondents, who will have found an ingenious new way to thwart the administrative process.

II. THE DISTRICT COURT LACKED JURISDICTION TO CONSIDER ITT'S ULTRA VIRES CLAIM

ITT alleged in its complaint, not only that closure of the Consultative Process violated the Sunshine Act, but also that the attending Commissioners' participation in those discussions was "unlawful and *ultra vires*, and in excess of the authority conferred * * * by the Communications Act" (J.A. 68). The court of appeals held that the district court had jurisdiction of the latter count, even though exclusive jurisdiction to review FCC orders is vested in the courts of appeals, even though ITT had presented an identical (or virtually identical) *ultra vires* argument to the FCC in its petition for rulemaking, and even though the FCC's order denying that rulemaking petition was simultaneously before the court of appeals for review.

The court of appeals' holding is an egregious departure from settled principles of administrative law. It undermines the statutory review procedure that Congress has mandated for review of FCC action. And it permits parties to subject administrative orders to collateral attacks that are duplicative, that waste judicial and agency resources, and that threaten to produce conflicting results.

A. The courts of appeals have exclusive jurisdiction to review FCC orders, and this exclusivity is based on sound considerations of policy and practicality

It is undisputed that, under the special statutory review provisions set forth in the Communications Act, exclusive jurisdiction to review final FCC orders lies in the courts of appeals. 28 U.S.C. 2342(1); 47 U.S.C.

402(a).¹⁹ While the district courts retain residual jurisdiction to review final agency action under 28 U.S.C. (Supp. V) 1331 and the Administrative Procedure Act, they may exercise such jurisdiction only "in the absence or inadequacy" of special statutory review. 5 U.S.C. 703. See 5 U.S.C. 704 (permitting district court review of agency action where "there is no other adequate remedy in a court"). This Court has emphasized that, "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, these procedures are to be exclusive." *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 420 (1965) (citing cases). Accord, e.g., *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-70 (1970); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 119, 121-122 (7th Cir. 1982); *City of Rochester v. Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979). The courts have repeatedly rejected litigants' attempts to evade these procedures by bringing district court actions that raise "collateral[] attack[s]" on administrative orders. *Whitney National Bank*, 379 U.S. at 421-422; *Gaunce v. deVincentis*, 708 F.2d 1290, 1292-1293 (7th Cir. 1982) (per curiam) (citing cases). District court jurisdiction is precluded where "the questions raised by the [plaintiffs] in the District Court * * * are cognizable by the [agency]," and are thus capable of being presented to the court of appeals

¹⁹ Section 402(a) of Title 47 provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter * * * shall be brought as provided by and in the manner prescribed" in 28 U.S.C. 2342(1). The latter section provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend [or] determine the validity of * * * all final orders of the Federal Communication Commission * * *."

on statutory review. *Whitney National Bank*, 379 U.S. at 417.

The statutory review procedure serves important policy objectives. It ensures that challenges to administrative action are presented to the agency before they are presented to the courts. It guarantees that agency action will be delayed or set aside only by an appellate panel, not by a single district court judge. It ensures review by a tribunal with far greater cumulative expertise about sometimes arcane regulatory matters. It streamlines the administrative process by removing a layer of judicial review. It reinforces the rule that agency decisions should be reviewed on the administrative record, not on the basis of de novo judicial factfinding. It prevents interference with agency work and harassment of agency staff through time-consuming discovery requests and trial court proceedings. And it prevents "unnecessary duplication and conflicting litigation" about the same issue. *Whitney National Bank*, 379 U.S. at 422. See generally *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv L. Rev. 980, 983 (1975).

B. ITT's ultra vires claim could have been reviewed by the court of appeals under 47 U.S.C. 402(a), and the district court thus had no jurisdiction to consider it

The court below acknowledged that exclusive jurisdiction to review FCC orders is generally committed to the courts of appeals (Pet. App. 13a). Yet it held that concurrent district court jurisdiction was nevertheless appropriate here, for two principal reasons. Neither reason justifies that holding.

1. First, while conceding that "[a] strong presumption against concurrent district court jurisdiction would be appropriate if the issues presented by ITT's rule-

making petition and its *ultra vires* count were indeed identical," the court of appeals believed that the issues were actually "very different" (Pet. App. 14a). ITT's rulemaking petition, as the court read it, "asked the Commission for a declaration of the nature of its authority * * * and argued that 'negotiation' [was] outside the scope of that authority." ITT's complaint, on the other hand, was viewed as "assert[ing] that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so" (*ibid.*; emphasis in original).

This exercise in hair-splitting cannot withstand analysis. ITT in its rulemaking petition quite plainly presented, among other arguments, an *ultra vires* argument identical to that set forth in its district court complaint. And even if it were possible to perceive some distinction between the two claims, it would be a distinction without a difference for purposes of answering the jurisdictional question posed here.

ITT's rulemaking petition expressly contended that the FCC "lacks authority to participate in" Consultative Process discussions of new carriers and services. See J.A. 32-33, 42, 46, 51 and 68.²⁰ The petition and the

²⁰ The petition begins by saying that "ITT Worldcom questions the wisdom of such proposed activities [*i.e.*, Consultative Process discussions of new carriers and services], and contends that the Commission lacks authority to participate in them" (J.A. 33). The petition ends by asserting that "the Commission must, at the threshold, face the issue of whether its contemplated course is a permissible one" (*id.* at 46). ITT described as "the primary underlying issue" the FCC's asserted "lack of authority for the course upon which it is apparently embarking" (*id.* at 51). ITT urged the Commission to adopt procedural rules only in the event that it "determine[d], on the basis of [ITT's proposed] policy evaluation, that it may proceed with an exchange of information with foreign administrations" (*id.* at 42). ITT's district court complaint itself acknowledged that its

complaint cited the same evidence—a series of statements by FCC representatives—in support of this ultra vires charge. Compare J.A. 35 n.2 and 52 with J.A. 64-68. The petition and the complaint sought essentially the same, prospective, relief—a prohibition (whether effected by agency rule or court injunction) against the FCC's engaging in ultra vires conduct at future Consultative Process sessions. Compare J.A. 47-48 with J.A. 70-71.²¹ The Commission itself interpreted the petition to present an ultra vires claim, summarizing the first issue raised by ITT as “whether the Commission has engaged in ‘negotiations’” (Pet. App. 77a), and concluding that “ITT’s argument, reduced to its essentials, is that the Commission lacks authority to engage in discussion with foreign governments and telecommunications entities” (*id.* at 71a). And the Commission, in

rulemaking petition “questioned the Commission’s authority to engage in the negotiations and discussions with foreign governments” (*id.* at 68).

²¹ In its brief in the court of appeals, ITT tried to articulate a distinction between the modes of relief sought, arguing that its petition was “entirely prospective in nature” and did not “ask the FCC to determine the legality of its past actions,” whereas its complaint “asked the District Court to review the legality of past actions the Commission had actually taken at the closed meetings” (C.A. Br. 39-40). ITT urges the same distinction here. Br. in Opp. 26. This post hoc distinction is illusory. ITT did not ask the district court to grant (and the district court had no power to grant) any retrospective relief; rather, ITT sought declaratory and injunctive relief as to future Consultative Process sessions. See J.A. 70-71. It is of course true that both the FCC and the district court, in considering ITT’s request for prospective relief, would have had to examine the attending Commissioners’ past conduct to determine, as a general matter, the permissible scope of FCC activity. But this does not change the prospective character of the relief sought. ITT has never contended that previous Consultative Process sessions from which it was excluded differ in any material respect from the sessions the FCC contemplated attending in the future.

its order denying the petition for rulemaking, comprehensively addressed ITT's ultra vires contention, concluding (*id.* at 82a) that the Consultative Process discussions were a "necessary and natural corollary" of its statutory authority to regulate "foreign commerce in communication by wire and radio" (47 U.S.C. 151).

Even if it were possible to discern some distinction between the ultra vires argument raised in ITT's rulemaking petition and the ultra vires claim presented in its district court complaint, the jurisdictional outcome would be the same. Any such variation was wholly a result of the way ITT chose to frame its pleadings. But this Court has emphasized that, where a statute vests exclusive jurisdiction to review agency action in the courts of appeals, nice distinctions of pleading will not enable collateral attacks to be brought before a district judge. In *Whitney National Bank*, the Court expressly ruled such formal distinctions irrelevant; it held that the district court was without jurisdiction because "the thrust of [the] complaint" (379 U.S. at 417) and "the heart of [the] argument" (*id.* at 418, 423) raised questions cognizable by the agency and exclusively reviewable in the courts of appeals.²²

There can be no question here that "the thrust" of ITT's complaint and "the thrust" of its rulemaking petition were substantially identical. Each challenged the Commissioners' authority to discuss new carriers and services at the Consultative Process. If ITT enter-

²² The complaint in *Whitney National Bank* requested an injunction against the Comptroller of the Currency's issuance to a newly-organized bank of a certificate of authority to do business (379 U.S. at 414, 417). This Court concluded, however, that the plaintiffs' "quarrel[,] in actuality," was with the Federal Reserve Board's approval of a bank holding company that included the newly-organized bank as a subsidiary. See *id.* at 417-419. The Court accordingly held that the district court lacked jurisdiction of the injunctive action and required the plaintiffs to submit their objections initially to the Board (*id.* at 419-423).

tained any doubt about its ability to have this challenge resolved in the rulemaking proceeding, it could have moved the FCC for a declaratory ruling (see 47 C.F.R. 1.2) concerning the legality of the attending Commissioners' conduct, and judicial review of that ruling would likewise have been available in the court of appeals.²³ What ITT could not do was circumvent these statutory review procedures by crafting razor-thin distinctions between the claim it asserted before the Commission and the claim it asserted before the district court.

In sum, by alleging that the FCC's participation in the Consultative Process was "unlawful and *ultra vires*, and in excess of the authority conferred * * * by the Communications Act," ITT's complaint asserted a claim identical, or virtually identical, to that presented in its rulemaking petition. The FCC had fully addressed that claim in its order denying rulemaking, the order denying rulemaking was pending before the court of appeals, and the court of appeals' jurisdiction to review that order was, under 47 U.S.C. 402(a), exclusive. Accordingly, the district court lacked jurisdiction of the *ultra vires* count.²⁴

²³ For cases involving appellate review of FCC declaratory rulings, see *Chisholm v. FCC*, 538 F.2d 349, 364-365 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976); *New York State Broadcasters' Ass'n v. United States*, 414 F.2d 990 (2d Cir. 1969). At least one court of appeals has cited the availability of a declaratory ruling under 47 C.F.R. 1.2 as a basis for foreclosing district court consideration of issues cognizable by the FCC. See *City of Peoria*, 690 F.2d at 121.

²⁴ Even if ITT's two claims were genuinely heterogeneous, it would not follow that the district court would have jurisdiction to proceed to the merits of the claim before it. In determining whether district court jurisdiction lies, the question is not whether the complaint tenders issues that have in fact been presented to the agency. The question, rather, is whether the "complaint tenders issues cognizable by the [agency]." *Whitney*

2. The court of appeals' second reason for sustaining district court jurisdiction was that "*de novo* judicial factfinding [was] necessary for a fair examination of the disputed issues" (Pet. App. 14a). The court found the rulemaking record "manifestly inadequate" and concluded that "ITT's colorable *ultra vires* claim [could] therefore be tested only through the kind of independent, *de novo* factfinding appropriate in the district court" (*id.* at 15a).

This reasoning stands administrative procedure on its head. If an appellate court "finds itself unable to exercise informed judicial review because of an inadequate administrative record," the proper course is to "remand [the] case to the agency for further consideration." *Harrison v. PPG Industries, Inc.* 446 U.S. 578,

National Bank, 379 U.S. at 419. Under the doctrine of "primary jurisdiction," a litigant does not have an election as to the forum in which he will raise a matter within the compass of an agency's regulatory expertise; rather, he must permit the agency to "have first crack at" the problem's resolution. *City of Peoria*, 690 F.2d at 120-121. Accord, *e.g.*, *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 295-306 (1973); *Writers Guild of America, Inc. v. American Broadcasting Companies, Inc.*, 609 F.2d 355, 365-366 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980). See generally L. Jaffe, *Judicial Control of Administrative Action* 121-135 (1965). If an agency has primary jurisdiction over an issue, the district court must either dismiss the complaint (*e.g.*, *Whitney National Bank*, 379 U.S. at 421, 426; *Far East Conference v. United States*, 342 U.S. 570, 574, 577 (1952)), or stay proceedings before it pending completion of the related agency action (*e.g.*, *Ricci*, 409 U.S. at 291; *City of Peoria*, 690 F.2d at 122). Where there are no issues in the district court other than those properly referable to the agency, the agency is capable of offering the full relief requested, and the agency's action will be exclusively reviewable in the court of appeals, dismissal of the complaint is usually the proper course. See L. Jaffe, *supra*, at 137-141 (discussing cases). Thus, even if ITT had not raised the *ultra vires* point in its rulemaking petition, dismissal of the *ultra vires* count would still have been proper under the "primary jurisdiction" doctrine.

593-594 (1980). An agency is not foreclosed from dealing with a question merely because a claim is made (as here) that it has exceeded its statutory authority. See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). Nor is a remand for further factfinding inappropriate merely because a claim is made (as here) that the agency has been guilty of ex parte contacts or other impropriety.²⁵ If, following a remand for further factfinding, the appellate court still finds the agency record inadequate, it may refer the case, under 28 U.S.C. 2347(b)(3), to a district court judge, who will act as special master in accordance with the court of appeals' specific guidelines and instructions.²⁶ Whatever procedure is adopted, the objective is to create a record adequate for judicial review—judicial review that, under the governing statutes, is committed exclusively to the courts of appeals. Neither law nor logic supports the notion that an inadequate administrative record, in and of itself, can somehow serve to abrogate the statutory review procedure and invest a district court with jurisdiction it would not otherwise have. Jurisdiction cannot so lightly be conferred.²⁷

²⁵ See, e.g., *PATCO v. FLRA*, 672 F.2d 109 (D.C. Cir. 1982); *HBO, Inc. v. FCC*, 567 F.2d 9, 58-59 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). See also *Writers Guild of America*, 609 F.2d at 363-364, 366 (holding that FCC had primary jurisdiction over claim of official misconduct by FCC Commissioner).

²⁶ See, e.g., *California Ass'n of the Physically Handicapped, Inc. v. FCC*, No. 80-6088 (9th Cir. Dec. 8, 1983), slip op. 5728-5729; *Lake Carriers' Ass'n v. United States*, 414 F.2d 567 (6th Cir. 1969). See also *City of Rochester*, 603 F.2d at 938 (suggesting transfer under 28 U.S.C. 2347(b)(3) "when petitioner's allegations necessitate factfinding beyond the competence of the agency").

²⁷ The court of appeals' reliance (Pet. App. 14a-15a n.52) on cases like *Investment Company Institute v. Board of Gover-*

3. The court of appeals' decision to remand the *ultra vires* count to the district court is particularly problematic when viewed in conjunction with its decision simultaneously to remand the rulemaking petition to the FCC. The court acknowledged that both tribunals would be required on remand to investigate precisely the same thing—"the nature of the [attending Commissioners'] off-the-record activities" at the Consultative Process (see Pet. App. 15a n.54). The court also acknowledged that this "double remand" was "fraught with the potential for duplication, conflicting resolutions, and further delay." *Id.* at 51a. Yet the court's suggested way out of this dilemma—that the Commission "stay[] further action on ITT's rulemaking petition pending the district court's resolution of the *ultra vires* issue" (Pet. App. 51a-52a)—only illustrates the court's cumulative errors. That suggestion inverts the doctrine of "primary jurisdiction" (see pages 44-45 n.24, *supra*) and flouts this Court's decision in *Whitney National Bank*. The Court there noted, as did the court below, that concurrent district court jurisdiction would create the potential for "unnecessary duplication" and "conflicting determinations" (379 U.S. at 422). But the Court's solution was not to stay the agency proceedings and order the matter determined in the first instance by the district court. Its solution, rather, was to order dismissal of the district court complaint and have "the

nors of the Federal Reserve System, 551 F.2d 1270, 1278 (D.C. Cir. 1977), and *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973), is misplaced. Those cases hold only that, where an agency takes certain kinds of informal action, the existence vel non of an adequate record is a useful factor in determining whether such action is a reviewable "order" for purposes of a direct review statute. There is no question here that the FCC's denial of ITT's petition for rulemaking is an "order." Indeed, ITT petitioned for review of that order and the court below assumed jurisdiction.

determination of the plan's propriety [be made] in the first instance" by the agency (*id.* at 421).

In short, neither rationale advanced by the court of appeals²⁸ justifies its decision to permit concurrent district court jurisdiction. That holding is an unprecedented departure from established principles of administrative law, and offers regulated parties yet another tool for disrupting the administrative process²⁹ by bringing time-consuming collateral attacks on agency decisions.

²⁸ The court of appeals also reasoned (Pet. App. 16a) that "subsequent judicial or administrative proceedings would not likely provide an adequate remedy for the Commission's alleged misconduct" because that misconduct "[was] not calculated to result in a final order, but rather to lead to unreviewable action by foreign administrations." This argument adds nothing to, but is merely derivative of, the two arguments discussed above. If, as we contend, ITT's ultra vires argument was in fact presented (or was capable of being presented) to the FCC in a petition for rulemaking or motion for declaratory ruling (see pages 41-44, *supra*), to be followed by statutory review under 47 U.S.C. 402(a), ITT had a completely adequate remedy for the Commission's alleged misconduct, and it is immaterial that the Consultative Process would not itself yield any "final orders" subject to judicial review.

²⁹ For example, in *Municipal Electric Utilities Ass'n v. Regan*, Civ. No. 83-0595 (D.D.C. 1983), a suit alleging that the Federal Energy Regulatory Commission relied on ex parte communications in taking certain action, plaintiffs have predicated jurisdiction in large measure on the court of appeals' reasoning below. The jurisdictional question has arisen in at least two challenges to FCC action since the opinion below was issued. See *California Ass'n of the Physically Handicapped, Inc. v. FCC*, *supra*; *Faith Center, Inc. v. FCC*, Civ. No. 83-1463 (D.D.C. filed May 23, 1983).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE

Solicitor General

RICHARD K. WILLARD

Acting Assistant Attorney General

KENNETH S. GELLER

Deputy Solicitor General

ALBERT G. LAUBER, JR.

Assistant to the Solicitor General

LEONARD SCHAITMAN

FRANK A. ROSENFELD

Attorneys

BRUCE E. FEIN

General Counsel

DANIEL M. ARMSTRONG

Associate General Counsel

C. GREY PASH, JR.

Attorney

Federal Communications Commission

JANUARY 1984

APPENDIX

Section 402(a) of the Communications Act, 47 U.S.C. 402(a), provides:

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

Section 2342 of 28 U.S.C. provides in pertinent part:

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47; * * *

The Government in the Sunshine Act, 5 U.S.C. 552b, provides in pertinent part:

(a) For purposes of this section—

(1) the term “agency” means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term “meeting” means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.

* * * * *

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,
Petitioners,

v.

ITT WORLD COMMUNICATIONS INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR RESPONDENT
ITT WORLD COMMUNICATIONS INC.**

GRANT S. LEWIS
*Counsel of Record for Respondent
ITT World Communications Inc.*
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:

JOHN S. KINZEY
MARY JO EYSTER
CHARLES C. PLATT
LEBOEUF, LAMB, LEIBY & MACRAE

—and—

HOWARD A. WHITE
SUSAN I. LITTMAN
ITT WORLD COMMUNICATIONS INC.
100 Plaza Drive
Secaucus, New Jersey 07096
(201) 330-5000

February 24, 1984

QUESTIONS PRESENTED

1. Did the lower court err when it held that the Government in the Sunshine Act, 5 U.S.C. § 552b, applies to closed meetings of the Federal Communications Commission ("FCC") with representatives of foreign telecommunications administrations at which, the FCC's representatives have admitted, the FCC is "applying leverage," in "a negotiating stance" and seeking a "*quid pro quo*"?
2. Did the lower court err when it held that the FCC's *ultra vires* attempts to negotiate with the foreign administrations on behalf of respondent's competitors constituted final agency "action" that was subject to judicial review in the district court, rather than a final agency "order" that was subject to review in the first instance in the court of appeals?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Nature of the Controversy	2
B. Underlying Facts	3
C. Proceedings Before the FCC and the District Court	8
1. The Freedom of Information Act Request ...	9
2. The Rulemaking Proceeding	10
3. The District Court Action	13
D. The Court of Appeals' Decision	15
SUMMARY OF ARGUMENT	17
POINT I: THE COURT OF APPEALS CORRECTLY HELD THAT THE FCC FAILED TO MEET ITS BURDEN TO SUSTAIN ITS ACTIONS UNDER THE SUNSHINE ACT	19
A. The Telecommunications Committee Was Authorized to Act on Behalf of the Full FCC at the Closed Meetings With the Foreign Administrations	23
B. The Telecommunications Committee Was Engaged in Deliberations That Determined or Resulted in the Disposition of Official Agency Business at the Closed Meetings	28

C. The FCC's Miscellaneous Arguments Against the Application of the Sunshine Act Are Without Merit	33
POINT II: THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT HAD JURISDICTION TO ADJUDICATE ITT WORLDCOM'S CLAIMS THAT THE FCC HAD ENGAGED IN <i>ULTRA VIRES</i> MISCONDUCT WHEN IT MET WITH THE FOREIGN ADMINISTRATIONS	37
CONCLUSION.....	47
STATUTORY APPENDIX	1a

TABLE OF AUTHORITIES

A. Cases	PAGE
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967) ..	43n, 45n, 46
<i>Allen v. Grand Central Aircraft Co.</i> , 347 U.S. 535 (1954)	45n
<i>Amusement & Music Operators Ass'ns v. Copyright Royalty Tribunal</i> , 636 F.2d 531 (D.C. Cir. 1980), <i>cert. denied</i> , 450 U.S. 912 (1981)	42n
<i>Ass'n of Bituminous Contractors v. Andrus</i> , 581 F.2d 853 (D.C. Cir. 1978)	38n
<i>Ass'n of Nat'l Advertisers, Inc. v. FTC</i> , 617 F.2d 611 (D.C. Cir. 1979)	38n, 43, 45n
<i>Ass'n of Nat'l Advertisers, Inc. v. FTC</i> , 627 F.2d 1151 (D.C. Cir. 1979), <i>cert. denied</i> , 447 U.S. 921 (1980) ..	38n
<i>Berenyi v. Immigration Director</i> , 385 U.S. 630 (1967) ..	19
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977)	38n
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971)	46
<i>City of Rochester v. Bond</i> , 603 F.2d 927 (D.C. Cir. 1979)	38
<i>Columbia Broadcasting Sys., Inc. v. United States</i> , 316 U.S. 407 (1942)	38
<i>Deutsche Lufthansa Aktiengesellschaft v. CAB</i> , 479 F.2d 912 (D.C. Cir. 1973)	42n
<i>Far East Conference v. United States</i> , 342 U.S. 570 (1952)	44n
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 (1980)	43n
<i>Graver Tank and Mfg. Co. v. Linde Air Products Co.</i> , 336 U.S. 271 (1949)	19

	PAGE
<i>Gulf Oil Corp. v. DOE</i> , 663 F.2d 296 (D.C. Cir. 1981)	44
<i>Harrison v. PPG Indus., Inc.</i> , 446 U.S. 578 (1980)	42
<i>Ind. Broker-Dealers' Trade Ass'n v. SEC</i> , 442 F.2d 132 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971)	42n
<i>Inv. Co. Inst. v. Bd. of Governors</i> , 551 F.2d 1270 (D.C. Cir. 1977)	42n
<i>ITT World Communications, Inc. v. FCC</i> , 595 F.2d 897 (2d Cir. 1979)	6, 13
<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958)	38n, 45
<i>McCulloch v. Sociedad Nacional</i> , 372 U.S. 10 (1963). 38n, 45	
<i>McKart v. United States</i> , 395 U.S. 185 (1969)	43n, 45
<i>Miller v. Youakim</i> , 440 U.S. 125 (1979)	36
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.</i> , ____ U.S. ____, 103 S.Ct. 2856 (1983)	40
<i>Nader v. Volpe</i> , 466 F.2d 261 (D.C. Cir. 1972)	44, 45n
<i>Templeton v. Dixie Color Printing Co.</i> , 444 F.2d 1064 (5th Cir. 1971)	46n
<i>United States v. Georgia Pub. Serv. Comm'n</i> , 371 U.S. 385 (1963)	36
<i>United States v. Western Pacific R. Co.</i> , 352 U.S. 59 (1958)	44n

B. Decisions of the Federal Communications Commission

<i>American Tel. & Tel. Co. (TAT-7)</i> , 73 F.C.C.2d 248 (1979)	4, 32n
<i>Inquiry into Policy to be Followed in Future Licensing of Facilities for Overseas Communications</i> , 53 F.C.C.2d 121 (1975)	5
<i>North Atlantic Facilities Plan</i> , 71 F.C.C.2d 64 (1979) . .	4

<i>Policies for Overseas Common Carrier Facilities</i> , 73 F.C.C.2d 193 (1979)	5
<i>Policies to be Followed in Future Licensing of Facilities for Overseas Communications</i> , 67 F.C.C.2d 358 (1977), <i>on further consideration</i> , 71 F.C.C.2d 71 (1979), <i>on reconsideration</i> , 71 F.C.C.2d 1090 (1979)	4
<i>Specialized Common Carrier Services</i> , 29 F.C.C.2d 870 (1970), <i>aff'd sub nom. Washington U. & T. Comm'n v. FCC</i> , 513 F.2d 1142 (9th Cir.), <i>cert. denied</i> , 423 U.S. 836 (1975)	5

C. Statutes, Rules and Regulations

Administrative Procedure Act

5 U.S.C. § 551(4)	39
5 U.S.C. § 702	39
5 U.S.C. § 703	1, 40
5 U.S.C. § 704	1, 38

Communications Act of 1934

47 U.S.C. § 155(d)(1)	4
47 U.S.C. § 201 <i>et seq.</i>	4
47 U.S.C. § 214	4, 26
47 U.S.C. § 402(a)	37, 38

Federal Rules of Civil Procedure

Rule 37	14n
Rule 56(e)	21

Freedom of Information Act

5 U.S.C. § 552	9
5 U.S.C. § 552(a)(6)(ii)	9
5 U.S.C. § 552(b)(5)	10

Government in the Sunshine Act

5 U.S.C. § 552b	i
5 U.S.C. § 552b(a)(1)	23
5 U.S.C. § 552b(c)(9)(B)	36
5 U.S.C. § 552b(h)(1)	15, 20

Regulations of the Federal Communications Commission

47 C.F.R. § 0.215	4, 26
-------------------------	-------

D. Legislative Material

H. Rep. No. 94-880, 94th Cong., 2d Sess. (1976)	23, 30, 30n, 31n, 34
S. Rep. No. 94-354, 94th Cong., 1st Sess. (1975)	21n, 23, 29, 30, 30n, 31n, 34

E. Other Materials

Berg & Klitzman, <i>An Interpretive Guide to the Government in the Sunshine Act</i> (1978)	29n, 33n
Currie & Goodman, <i>Judicial Review of Federal Administrative Action; Quest for the Optimum Forum</i> , 75 Colum. L.Rev. 1 (1975)	42n
Davis, <i>Administrative Law Treatise</i> (2d ed. 1983)	42
<i>Telecommunications Reports</i> , Vol. 47, No. 8 (February 20, 1981)	35

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-371

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,
Petitioners,

v.

ITT WORLD COMMUNICATIONS INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR RESPONDENT
ITT WORLD COMMUNICATIONS INC.**

Respondent ITT World Communications Inc. ("ITT Worldcom") submits this brief in opposition to the brief submitted on behalf of petitioners Federal Communications Commission ("FCC") and the United States of America.¹

STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited in the FCC's brief, this case involves the application of Sections 10(b) and 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 703 and 704, which are set forth in a statutory appendix.

1 ITT Worldcom's statement pursuant to Rule 28.1 of the Supreme Court Rules is included in its brief in opposition to the FCC's petition for a writ of certiorari. Since that statement was prepared, one of ITT Worldcom's affiliates has acquired twenty five percent of the common stock of Thomson McKinnon Securities Inc., which is publicly traded.

STATEMENT OF THE CASE

A. The Nature of the Controversy

This controversy arose because the FCC, the agency responsible for licensing the international telecommunications facilities that link the United States with other nations, sought to use the leverage it enjoyed by virtue of this regulatory power to influence the policies of other governments' telecommunications administrations. Because negotiation with foreign governments is, as the FCC recognized, the exclusive province of the State Department, the FCC's efforts to bargain with the foreign administrations could not stand the light of day. The FCC therefore insisted that ITT Worldcom and other interested American parties, which had been allowed to attend the FCC's previous, lawful discussions with the foreign administrations, be excluded from these meetings, which were then moved behind closed doors. By holding its improper discussions with the foreign administrations, and attempting to conceal from interested parties and the courts what had actually transpired during the closed meetings, the FCC ran afoul of numerous provisions of the Communications Act, the Logan Act, the Government in the Sunshine Act, and the Freedom of Information Act.

The writ of certiorari brings before this Court only two of the many issues on which the court of appeals ruled below. The FCC urges that the lower court erred when it (1) held that the FCC must comply with the provisions of the Sunshine Act when it meets with the foreign administrations, and (2) ruled that the district court, rather than the court of appeals, has jurisdiction to review in the first instance whether the FCC's representatives engaged in *ultra vires* misconduct during the closed meetings that have already taken place.

It should be emphasized at the outset that the arguments the FCC advances in this Court are all premised on the unsubstantiated factual assertion that its closed discussions with the foreign administrations were nothing more than "an informal exchange of views on extremely general subjects." FCC Brief at 26. There is not a shred of admissible evidence in the record that supports the FCC's persistent efforts to characterize its

meetings with the foreign administrations as "informal" information exchanges. To the contrary, the court of appeals specifically concluded that the closed meetings were *not* " 'informal discussions' among members," but rather were "prearranged conferences held to effectuate public business of the greatest import." 43a, 699 F.2d at 1244.²

The lower court based these conclusions on the FCC's own admissions that when it met with the foreign administrations, it was applying "leverage," "in a negotiating stance," and expecting a "tit" for its recent authorization of the "TAT," the new transatlantic cable sought by the Europeans and originally opposed by the FCC. Even though these admissions refute the FCC's claim that it did nothing more than exchange information "informally" at the closed meetings, the FCC made no effort to rebut them with affidavits or other evidence when it responded to ITT Worldcom's motion for summary judgment on its Sunshine Act claim. Instead, the FCC affirmatively represented to the district court that "there are no material issues of fact in dispute in this case." (JA 173.) For the FCC to suggest that this case involves the question of whether the Sunshine Act applies to "informal, general discussions . . . concerning issues of mutual interest," FCC Brief at (i), is an improper attempt to argue in this Court a case that was never presented to the courts below.

B. Underlying Facts

ITT Worldcom is one of a number of American carriers that compete to provide international telecommunications services between the United States and foreign countries.³ Although

² Citations herein of a page number followed by a small "a" are to the appendices to the FCC's petition. Citations in the form "JA" followed by a page reference are to the Joint Appendix.

³ When this controversy arose, the principal American carriers that competed to provide international "record," or non-voice, communications services were ITT Worldcom, RCA Global Communications, Inc., Western Union International, Inc., and TRT Telecommunications Corp. These carriers are generally known as international record carriers, or "IRCs." American Telephone & Telegraph Co. was, and remains, the dominant carrier of international "voice" communications.

ITT Worldcom has ownership interests in cable and satellite systems that link the United States and the rest of the world, it cannot provide service directly to any foreign nation without the cooperation of that nation's telecommunications "administration," which owns and operates the local telecommunications network in the foreign country. The foreign administrations are generally governmental agencies that enjoy a monopoly of telecommunication services within their respective nations. ITT Worldcom has entered into arrangements known as "operating agreements" with a number of foreign administrations that allow ITT Worldcom to offer its American subscribers international communications with those administrations' customers.

Although the FCC has authority under Title II of the Communications Act, 47 U.S.C. § 201 *et seq.*, to regulate the rates and practices of ITT Worldcom and the other American carriers that provide international services, it has no jurisdiction over other governments' telecommunications administrations. The FCC does, however, have the ability to influence the foreign administrations indirectly, because Section 214 of the Communications Act, 47 U.S.C. § 214, gives the FCC power to approve or disapprove the American carriers' applications for the construction of new international facilities, which are ordinarily constructed jointly by the American carriers and the foreign administrations. Pursuant to Section 5(d)(1) of the Communications Act, 47 U.S.C. § 155(d)(1), the FCC has formally delegated its authority to rule on "Section 214" applications for new international facilities to a committee of three FCC commissioners designated as its "Telecommunications Committee." 47 C.F.R. § 0.215.

The FCC's ability to deny the necessary authorizations for international facilities that the European administrations want to build has recently caused considerable friction between the FCC and those foreign administrations. In particular, the FCC has been reluctant to approve the construction of new transatlantic submarine cables (known by the acronym "TATs") that the European administrations thought were needed. See, e.g., *American Tel. & Tel. Co. (TAT-7)*, 73 F.C.C.2d 248 (1979); *North Atlantic Facilities Plan*, 71 F.C.C.2d 64 (1979); *Policies to be Followed in Future Licensing of Facilities for*

Overseas Communications, 67 F.C.C.2d 358 (1977), on further consideration, 71 F.C.C.2d 71 (1979), on reconsideration, 71 F.C.C.2d 1090 (1979).⁴ At a meeting held in September 1974, the FCC and the European administrations "determined that an ongoing process of exchange of information and views among all the entities concerned with the provision of telecommunications services in the North Atlantic Region could improve the planning of jointly-owned facilities in that region," and, it was hoped, "avoid divergent facilities preferences among [European administrations], Canada, and the U.S." *Policies for Overseas Common Carrier Facilities*, 73 F.C.C.2d 193, 195 (1979). See also *Inquiry into Policy to be Followed in Future Licensing of Facilities for Overseas Communications*, 53 F.C.C.2d 121, 122-3 (1975). Thereafter, a series of meetings began that came to be known as the "Consultative Process." These meetings were open to all interested parties, including ITT Worldcom, as well as the FCC and the foreign administrations. The FCC was represented at the meetings by members of its staff, and by the three members of its Telecommunications Committee who, as indicated above, had been authorized to rule on applications for new international facilities.

Beginning with its decision in *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1970), *aff'd sub nom. Washington U.&T. Comm'n v FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), the FCC has evolved a policy of "open entry" into the domestic telecommunications market, which allowed new competitors to compete with the older, more established domestic carriers. In 1977, the FCC, apparently without any prior consultation with the foreign administrations, authorized two of the new domestic carriers, GTE Telenet Communications Corp. ("GTE") and Graphnet Systems, Inc. ("Graphnet") to provide international service in competition with ITT Worldcom and the other existing IRCs. In a departure from its traditional regulatory practice, the FCC granted GTE and Graphnet this authorization even though neither carrier had negotiated the "operating agreements" with

4 The FCC has suggested that increases in transatlantic traffic might better be accommodated by additional satellite channels, rather than the new cables that the Europeans prefer.

foreign administrations that were necessary before they could actually begin to provide international service. On appeal, the Court of Appeals for the Second Circuit reversed the FCC on this ground, holding that the FCC erred "in granting [GTE and Graphnet] perpetual authorization regardless of how long the consummation of necessary agreements with foreign communications administrations may take." *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 903 (2d Cir. 1979). The Second Circuit instructed the FCC to place a reasonable limit on the amount of time GTE and Graphnet had to negotiate satisfactory operating agreements, after which their authorizations would automatically expire.⁵

GTE and Graphnet were not immediately successful in obtaining operating agreements with the foreign administrations which, as governmental monopolies, do not share the FCC's policy preference for unrestricted "open entry" into the telecommunications market. The court of appeals found that "[i]n response, the Commission in 1979 turned to the consultative process as a forum for encouraging foreign cooperation with the newly authorized carriers," 5a, 699 F.2d at 1225, and attempted to use the Consultative Process "as the vehicle to assist Graphnet and [GTE] . . . in obtaining interconnection agreements." 39a, 699 F.2d at 1242. To accomplish this objective, the FCC insisted on excluding the American carriers from its meetings with the foreign administrations:

At the October, 1979 [Consultative Process] meeting in Dublin, Ireland . . . the [FCC's] Telecommunications Committee persuaded its foreign counterparts to expand the meeting's focus to "include the United States' authori-

5 The Second Circuit also found merit in ITT Worldcom's principal appellate argument that the FCC had given GTE and Graphnet an unfair competitive advantage over ITT Worldcom and the other established IRCs by allowing them to provide international service without subjecting them to the significant restrictions on their domestic operations to which the IRCs were then subject. The court suggested that the FCC expedite a pending proceeding in which it was considering the IRCs' requests to expand their domestic operations, and directed it to modify the authorizations it had granted GTE and Graphnet to remove any inequalities in competitive opportunities that remained after the pending FCC proceeding had been concluded.

zation of new telecommunications services and carriers," and to exclude representatives of American carriers from this part of the meeting. In addition to the Dublin meeting, a February 1980 meeting in Ascot, England and an October, 1980 meeting in Madrid, Spain were closed during discussions of this topic.

5a-6a, 699 F.2d at 1225 (footnote omitted).

Because the FCC consented to the adjudication of ITT Worldcom's district court action on summary judgment before any meaningful discovery was had, *see infra*, p. 14, ITT Worldcom does not know to this day precisely what transpired at the closed meetings between the FCC and the foreign administrations. Without any evidentiary support, the FCC's attorneys have argued in their briefs that the closed meetings were nothing more than "informal information exchanges," no different from the exchanges that occurred at the open Consultative Process meetings. However, the FCC has never explained, in the lower courts or in this Court, why, if this were so, the FCC found it necessary to insist that the meetings be closed, rather than follow the traditional open meeting format.

As will be more fully demonstrated below, statements made publicly by the FCC's commissioners and staff, when uncensored by counsel, enabled ITT Worldcom to demonstrate to the satisfaction of the lower courts that the FCC was in fact engaged in activities far more significant than "informally exchanging information" during its closed meetings. More specifically, these statements established that the FCC was negotiating with the foreign administrations by "advising the foreign administrations of a linkage between their cooperation with the newly authorized American carriers and the Commission's receptivity to their needs in other areas," such as the authorization of new overseas facilities. 7a, 699 F.2d at 1226.

For example, Charles Ferris, who was then chairman of the FCC, testified at a Congressional hearing that the Telecommunications Committee "seeks to apply 'leverage' at the [closed] meetings to 'bring a greater sense of urgency to our correspondents overseas so that they will give due consideration to the competitive environment . . . [we] have in the United States.'" 7a-8a, 699 F.2d at 1226, n.26. Similarly,

Commissioner Fogarty stated during a speech in Montreal that because the FCC had accommodated the European administrations by authorizing a new transatlantic communications cable, or "TAT," "the FCC expects a 'tit' for the 'TAT' and a '*quid pro quo*.'" *Id.* At a later FCC meeting, Commissioner Fogarty stressed the importance of showing the European administrations that "we . . . really mean business." (JA 152.) A third commissioner, Commissioner Washburn, conceded in an open FCC meeting that the Telecommunications Committee was "talking to people in a negotiating stance abroad." 7a-8a, 699 F.2d at 1226, n.26. And the FCC's general counsel described the closed meetings as a "mechanism to narrow differences and to move toward consensus on common principles and approaches." (JA 167-68.)

After reviewing statements such as these, the court of appeals concluded:

The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members, but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the communications industry. They are, in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."

43a, 699 F.2d at 1244 (footnote omitted).

C. Proceedings Before the FCC and the District Court

The FCC's decision to use its leverage to "encourage" the foreign administrations to enter into operating agreements with GTE and Graphnet was a cause of considerable concern to ITT Worldcom. As indicated above, the foreign administrations do not share the FCC's policy preference for a multiplicity of international carriers. Any decision by a foreign administration to deal with the two new carriers the FCC favored was therefore likely to make that administration less likely to continue its existing operating agreements with ITT Worldcom, or to give ITT Worldcom new operating agreements in the

future. Further, as a result of their past difficulties in obtaining FCC approval for new international facilities, the foreign administrations were likely to be extremely susceptible to the FCC's suggestions that its receptivity to their future facility requests would depend on their treatment of GTE and Graphnet.

In an effort to learn more about what the FCC had been doing at the closed meetings, and to prevent the FCC from continuing its improper efforts to influence the foreign administrations, ITT Worldcom took a number of steps, first before the FCC and then before the district court. As will be described below, the FCC took no action in response to ITT Worldcom's requests for administrative relief (other than to proceed with its plans for another closed meeting with the foreign administrations in Ascot, England) until ITT Worldcom brought suit against it in the district court. The FCC then adopted formal decisions denying ITT Worldcom the administrative relief it sought that were carefully crafted in an effort to improve the FCC's litigation position in the district court.

1. *The Freedom of Information Act Request*

On October 12, 1979, after the FCC had held its first closed meeting with the foreign administrations in Dublin, ITT Worldcom made a request to the FCC for the disclosure of documents pertaining to that meeting, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. (JA 20.) On November 16, 1979, the Chief of the FCC's Common Carrier Bureau, acting pursuant to delegated authority, refused to produce fifteen of the twenty-three documents responsive to ITT Worldcom's request. (JA 22.) On December 17, 1979, ITT Worldcom filed an Application for Review of this decision with the full FCC. Although the FOIA required the FCC to rule on ITT Worldcom's request within twenty days, 5 U.S.C. § 552 (a)(6)(ii), the FCC had taken no action when ITT Worldcom commenced its district court action on February 12, 1980, which, *inter alia*, sought to compel disclosure of the documents the FCC had withheld. On February 14, 1980, two days after ITT Worldcom's complaint was served, the FCC voted to adopt a *Memorandum Opinion and Order* (JA 93), which

granted ITT Worldcom access to a few of the documents, but otherwise denied ITT Worldcom's administrative appeal.

In its *Memorandum Opinion and Order* disposing of the FOIA appeal, the FCC took the position that its participation in the closed meetings was an integral part of performing its official function:

The Commission *must* attend such conferences in order to discharge its non-delegable duty to authorize international wire and radio communications in the public interest and to regulate "interstate and *foreign* commerce in communications so as to make available . . . to all the people of the United States a rapid, efficient . . . worldwide wire and radio communications service with adequate facilities at reasonable charges. . . ."

(JA 97-98, citations omitted, initial emphasis supplied.)

The FCC upheld the nondisclosure of documents pertaining to the closed meeting in Dublin under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), as subject to the so-called "deliberative process" privilege. In so holding, the FCC expressly conceded that the discussions at the closed Dublin meeting were part of a process of deliberation that would ultimately result in a final agency determination:

The Dublin conference and the various memoranda related thereto were likewise intended to assist the Commission in gathering information concerning international facilities matters which ultimately will be presented for its determination. The memoranda are therefore deliberative and predecisional materials.

(JA 99.)

2. *The Rulemaking Proceeding*

On October 29, 1979, ITT Worldcom filed a petition for administrative rulemaking with the FCC. (JA 32.) Because the FCC now argues that an appeal from the FCC's decision denying this petition was the only vehicle by which ITT Worldcom could obtain judicial review of the FCC's misconduct at its closed meetings with the foreign administrations, it is important to emphasize that ITT Worldcom's petition did

not seek any form of relief from the FCC's actions at its meeting in Dublin, the only closed meeting that had already occurred.⁶ Nor did ITT Worldcom seek an adjudication from the FCC of the legality of the agency's own past conduct.

Although ITT Worldcom's petition for rulemaking preserved ITT Worldcom's position that efforts to influence foreign administrations would be *ultra vires*, the petition was premised on the assumption that the FCC would continue to meet with the foreign administrations. ITT Worldcom sought purely prospective procedural relief to prevent the FCC from intentionally or inadvertently abusing the Consultative Process in the future. As a result, ITT Worldcom's request for rulemaking was largely addressed to the FCC's discretion. ITT Worldcom requested, *inter alia*, that the FCC adopt regulations that would delineate the authority of the commissioners and staff who met with the foreign administrations, and clearly indicate that they had no power to negotiate or bind the FCC. ITT Worldcom also asked that the FCC adopt procedural rules for the meetings that would provide that the meetings ordinarily would be open, and that interested parties would receive notice of the meetings and an opportunity to comment on the subjects the FCC proposed to discuss with the foreign administrations.

The FCC took no action on ITT Worldcom's rulemaking petition until ITT Worldcom had brought suit in the district court. The FCC then denied the petition and, as the court of appeals observed, "there is evidence suggesting that the rulemaking denial was crafted in part to enhance the Commission's litigation posture in the district court action." 50a, 699 F.2d at 1247-48.⁷

6 Indeed, the petition for rulemaking contains only a single passing reference to the Dublin meeting. (JA 44.)

7 The evidence to which the court of appeals referred consists of statements by the FCC's general counsel and staff at the meeting at which the FCC denied ITT Worldcom's rulemaking petition. General counsel Bruce, successfully arguing against Commissioner Washburn's suggestion that action on ITT Worldcom's petition be further delayed, advised the FCC that it should "deal with this petition at this time because of the pending litigation in the District Court," and an FCC staff member told the commissioners that

In addition to denying ITT Worldcom's petition for prospective relief, the FCC gratuitously volunteered a lengthy self-serving denial that it had acted improperly in the closed meetings it had already held with the foreign administrations. The FCC conceded, as it does in this Court, that it has no authority to "negotiate" with foreign administrations, but it denied that it had in fact done so. In thus judging itself innocent of any misconduct, the FCC made no effort to explain its members' prior statements that the FCC's representatives were "applying leverage," were seeking "tit for TAT" and were asking for a "*quid pro quo*" at the closed meetings. At the very meeting at which the FCC voted to adopt the rulemaking denial, which asserted that the FCC had never engaged in "negotiations," Commissioner Washburn made the remarkable statement that no transcripts should be prepared at the closed meetings because "[w]hen you are talking to people in a negotiating stance abroad you don't want to get in that posture. . . ." (JA 158.) Despite these inconsistent statements, which the FCC's rulemaking denial never even acknowledged, the FCC's decision characterized the closed meeting as nothing more than "informal exchanges." Aside from this conclusory, self-serving characterization, the rulemaking denial gave virtually no details as to what the FCC claims was actually said and done at any of the closed meetings.⁸

the draft order that had been circulated would be changed to "help it coordinate with the collateral court suit that ITT has filed in the District Court. . . ." 50a, 699 F.2d at 1248, n. 202. (JA 162.)

8 With respect to the specific procedures that ITT Worldcom recommended the FCC follow at its meetings with the foreign administrations, the FCC purported to find merit in most of ITT Worldcom's suggestions, including its proposal that the meetings ordinarily be open. However, it stated that it would follow these procedures as a matter of discretion, without adopting any binding rules, and the FCC "expressly reserve[d] the right to depart from [these procedures] where necessary. . . ." 11a, 699 F.2d at 1228. Despite the FCC's protestations that it would ordinarily follow these procedures, it simply ignored them when it next met with the foreign administrations. Further, its decision not to follow these procedures was itself made in secret, rather than at an open meeting conducted in accordance with the Sunshine Act.

3. *The District Court Action*

While its FOIA appeal and rulemaking petition were languishing without action before the FCC, ITT Worldcom learned that the FCC was planning another "closed door" meeting with the foreign administrations in England. The purpose of this meeting was disclosed by Commissioner Fogarty at an open FCC meeting on January 30, 1980, at which the FCC voted to extend the deadline that it had placed on Graphnet's efforts to negotiate operating agreements pursuant to the remand from the Second Circuit in *ITT World Communications, Inc. v. FCC*, *supra*. Commissioner Fogarty stated that "we are going to London in a couple of weeks to discuss with the European entities the question of allowing our value added carriers and specialized carriers to do business in Europe." (JA 152.) Commissioner Fogarty, who had previously stated that he and the other members of the Telecommunications Committee were seeking a "tit for TAT" and a "*quid pro quo*" from the Europeans, went on to urge that the FCC extend Graphnet's Section 214 authorization, because if it did not, "it might be a signal to the European entities that we don't really mean business." *Id.*

On February 12, 1980, ITT Worldcom filed suit against the FCC in the United States District Court for the District of Columbia. As its first claim for relief, ITT Worldcom sought judicial review of what had actually transpired at the Telecommunications Committee's closed meetings with the foreign administrations, and a determination that the FCC had in fact engaged in *ultra vires* attempts to negotiate with those foreign governmental entities on behalf of ITT Worldcom's competitors. In contrast to the discretionary relief that ITT Worldcom sought from the FCC in its rulemaking petition, ITT Worldcom's complaint in the district court prayed for an injunction that would permanently enjoin the FCC from continuing its *ultra vires* misconduct. ITT Worldcom's complaint also sought an order requiring the FCC to comply with the Sunshine Act when it met with the foreign administrations, and asked the district court to direct the FCC to release the documents that it had refused to produce in response to ITT Worldcom's FOIA request.

The district court's disposition of ITT Worldcom's complaint came on cross-motions for summary judgment. Pursuant to a local court rule, ITT Worldcom submitted a statement of the facts it contended were not in dispute on its Sunshine Act claim. (JA 170.) As part of this statement, ITT Worldcom proffered what it asserted were true reports and transcripts of the concessions made by the FCC's commissioners and staff that the Telecommunications Committee was applying "leverage," seeking "tit for TAT," and "in a negotiating stance" when it met with the foreign administrations. (JA 171, incorporating JA 164-169.) In its response to ITT Worldcom's statement, the FCC agreed that the facts were not in dispute, and admitted that its representatives had made the statements that ITT Worldcom quoted. (JA 173.) The FCC submitted no affidavit or other evidence to describe what it claimed occurred at the closed meetings with the foreign administrations, and it made no effort to establish, as a factual matter, that only "informal" exchanges of information occurred at those meetings.

The FCC's decision not to raise any issue of fact in the district court as to what actually occurred at the closed meetings was undoubtedly a calculated litigation strategy designed to avoid pretrial discovery in which ITT Worldcom might develop more evidence of what actually occurred at the closed meetings.⁹ Rather than risk discovery by disputing ITT Worldcom on the facts, the FCC chose to rely principally on a legal argument that the Sunshine Act could not apply to the closed meetings because the Telecommunications Committee, which represented the FCC at those meetings, was less than a quorum of the full FCC.

While the FCC did not submit any evidentiary opposition to ITT Worldcom's motion for summary judgment on its Sunshine Act claim, the FCC's legal memoranda nonetheless "engaged in much obfuscation about the substance of [its] discussions" at the closed meetings. 29a, 699 F.2d at 1237.

9 ITT Worldcom served interrogatories and document requests with its complaint. The FCC's responses to these discovery requests were patently inadequate, and ITT Worldcom's motion to compel pursuant to Fed. R. Civ. P., Rule 37, was pending at the time the district court entered judgment.

Much of the confusion in the FCC's papers resulted from the FCC's inability to give a consistent description of what occurred at the meetings without compromising its legal position on one or more of the claims that ITT Worldcom had made against it. For example, in opposition to ITT Worldcom's Sunshine Act claim, the FCC continued to argue, without evidentiary support, that the closed meetings were only "informal" information exchanges at which no deliberations or decisions occurred and no official business was conducted. However, in opposing ITT Worldcom's attempt to compel the disclosure of documents under the FOIA, the FCC continued to take the position that background memoranda prepared for the Telecommunications Committee's use before the closed meetings were "predecisional," and therefore exempted from disclosure by the "deliberative process" privilege of the FOIA.

Having before it ITT Worldcom's un rebutted evidence that the Telecommunications Committee was engaged in substantive discussions with the foreign administrations, and faced with the FCC's inability to give a coherent account of the closed meetings even in its unsworn papers, the district court held that the FCC had failed to meet its burden under the Sunshine Act to demonstrate that the Telecommunications Committee was not conducting official agency business on the FCC's behalf when it met with the foreign administrations. See 5 U.S.C. § 552b(h)(1).¹⁰ The district court also directed the FCC to disclose the documents that ITT Worldcom sought under the FOIA. Finally, the district court dismissed ITT Worldcom's claim based on allegations of *ultra vires* conduct, on grounds of ripeness and standing that were rejected by the court of appeals and that the FCC does not raise in this Court.

D. The Court of Appeals' Decision

ITT Worldcom and the FCC appealed and cross-appealed from the district court's judgment, and these appeals were consolidated for argument with ITT Worldcom's petition for review of the FCC's order denying its petition for rulemaking.

¹⁰ This section of the Sunshine Act gives the district courts jurisdiction to enforce the Act and provides that in any such action "[t]he burden is on the defendant to sustain his action." See *infra*, p. 20.

The FCC sought a stay pending appeal from the district court's judgment requiring it to comply with Sunshine Act, first in the district court and then in the court of appeals. In support of these stay applications, the FCC submitted affidavits from its representatives at the closed meetings which, for the first time, asserted under oath that the FCC had limited itself to activities that might be characterized as "informal information exchanges" at the closed meetings. The FCC declined to permit ITT Worldcom's counsel to examine its affiants on the conclusory, self-serving statements set forth in their affidavits, and the motions for a stay were denied in both lower courts.¹¹

In its decision on the merits, entered February 1, 1983, the court of appeals affirmed the district court's ruling on ITT Worldcom's Sunshine Act claim. The court noted that on appeal, the FCC "has relied heavily on the Lee and Demory affidavits [submitted in support of its stay applications] in support of its characterization of the closed CP meetings," even though "[n]either affidavit was submitted until after the district court had rendered its decision." 45a, 699 F.2d at 1245, n. 179. The court of appeals "look[ed] with great disfavor on such *post hoc* attempts to supplement the record," *id.*, but nonetheless considered the affidavits' contents. The court found that "the affidavits are vague, conclusory and contradictory," and "largely parrot[] the language of the statute and the legislative history." *Id.* The court of appeals concluded that "such conclusory affidavits, even if properly considered at this juncture, are wholly inadequate to sustain the Commission's burden of proof" under the Sunshine Act. *Id.* The court of appeals therefore agreed with the district court "that there are no genuine issues of material fact. . . ." 35a, 699 F.2d at 1240. It affirmed the lower court's determinations that the Telecommunications Committee was authorized to act on be-

11 The FCC refused to produce the first affiant, Commissioner Lee, for examination at the district court's hearing on the FCC's stay application in that court. When the FCC moved for a stay pending appeal four months later in the court of appeals, its motion was denied after the FCC declined ITT Worldcom's request to depose FCC staff member Demory, who had submitted a second affidavit in support of that motion.

half of the full FCC at the closed meetings, 36a-37a, 699 F.2d at 1240-41, and that the closed meetings were not "informal" exchanges of information but rather were "prearranged conferences held to effectuate public business of the greatest import" and "an integral part of the Commission's policymaking processes." 43a, 699 F.2d at 1244.

In reversing the dismissal of ITT Worldcom's first claim for relief, based on its allegations that the FCC had engaged in *ultra vires* negotiations with the foreign administrations, the court of appeals found that the FCC's attempts to coerce the foreign administrations into giving GTE and Graphnet operating agreements would not, by their nature, result in a final FCC "order" which could be reviewed directly by the court of appeals. The court therefore held that the misconduct alleged in ITT Worldcom's complaint fell within the district court's residual jurisdiction to review final agency "action" that is not a final "order" appealable to the court of appeals. The court also rejected the FCC's argument that it should review the legality of the FCC's conduct at the meetings when it ruled on ITT Worldcom's appeal from the FCC's rulemaking denial. The court held that there was no factual or evidentiary "record" before it on the rulemaking appeal that would allow it to determine what had actually occurred at the closed meetings, and found that in the absence of such a record, *de novo* fact-finding by the district court was necessary for adequate judicial review. 13a-21a, 699 F.2d at 1229-33.¹²

SUMMARY OF ARGUMENT

I. Because the FCC deliberately chose not to contest the facts in the courts below, this Court should reject the FCC's unsupported assertions that it was only "exchanging information informally" with the foreign administrations, rather than "applying leverage" and seeking a "*quid pro quo*," as it conceded in its response to ITT Worldcom's summary judg-

¹² In other portions of its decision that are not before this Court, the court of appeals also reversed the denial of ITT Worldcom's rulemaking petition, and reversed in part and affirmed in part the district court's ruling sustaining ITT Worldcom's FOIA claims.

ment motion. The lower courts correctly held that the FCC failed to meet its burden to sustain its actions under the Sunshine Act, and the decision below should therefore be affirmed by this Court.

A. The court of appeals, largely on the basis of the FCC's own representations to the lower courts, correctly determined that the Telecommunications Committee was "authorized" to act on behalf of the full FCC. Contrary to the FCC's arguments, the Sunshine Act does not require that authorization be conveyed with any particular degree of formality, and the FCC may not justify its refusal to comply with the Sunshine Act by relying on its unlawful failure to specify the Telecommunications Committee's authority by published rule or order, as it was required to do by the Communications Act. In any event, the Telecommunications Committee's activities at the closed meetings fall within the Committee's "formal" authorization to license new international facilities, since the FCC itself insists that the Committee's participation in the meetings is a necessary part of discharging this delegated authority.

B. The court of appeals correctly determined that the closed meetings were "meetings" for the purposes of the Sunshine Act. The FCC does not deny that if it was "applying leverage," "in a negotiating stance" and "seeking tit for TAT," as it admitted below, the Sunshine Act would be fully applicable. Even if the closed meetings were merely "information exchanges," as the FCC claims, they would still be subject to the Act, under the legal standard the FCC proposes in its brief, because they are an integral part of the FCC's decisional processes that precede final agency action on requests for new international facilities.

C. The FCC's remaining arguments against the applicability of the Sunshine Act are essentially policy arguments against the wisdom of the Act's provisions that were rejected by Congress.

II. The court of appeals correctly decided that the district court, rather than the court of appeals, should adjudicate ITT Worldcom's allegations that the FCC in fact engaged in *ultra*

vires negotiations at its closed meetings with the foreign administrations. The FCC's activities at the closed meetings did not result in agency "orders" within the appellate jurisdiction of the court of appeals, but rather were within the district court's "residual" jurisdiction to review final agency "actions" that do not take the form of orders. The court of appeals' decision on this issue is consistent with the generally recognized principle that when the governing statutes permit, review of agency action requiring *de novo* fact-finding should be channeled to the district courts, rather than to the courts of appeal. The lower court's recognition of a limited "residual" jurisdiction in the district court will not disrupt the administrative process, because the familiar doctrines of ripeness, finality, and exhaustion of administrative remedies will prevent interlocutory interruption of ongoing administrative proceedings except in unusual cases, such as this, in which the agency engages in patently *ultra vires* misconduct that cannot be adequately remedied on direct appeal from a future final order.

**POINT I: THE COURT OF APPEALS CORRECTLY HELD
THAT THE FCC FAILED TO MEET ITS BUR-
DEN TO SUSTAIN ITS ACTIONS UNDER THE
SUNSHINE ACT.**

It is axiomatic that this Court "cannot undertake to review concurrent findings of fact of two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967), quoting *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The FCC nonetheless would have this Court ignore the proceedings before the two lower courts and determine *de novo*—on the basis of the FCC's self-serving statements in its brief rather than on the undisputed evidentiary record below—what in fact transpired at the FCC's closed meetings with the foreign administrations.

Over and over again, in each point of its Sunshine Act argument, the FCC's brief describes the closed meetings as nothing more than "informal" information exchanges, as if constant repetition of that adjective could make the FCC's assertions true. In suggesting that the court of appeals has

applied the Sunshine Act to "informal" information exchanges, the FCC raises a "straw man." The court of appeals expressly recognized that the Act "does not *per se* forbid all informal off-the-record discussions between a quorum of an agency and outside parties. . . ." 43a, 699 F.2d at 1244. However the court of appeals found that "there is substantial evidence that would appear to contradict the Commission's characterization of the discussions as mere unofficial 'information exchanges,' " 7a, 699 F.2d at 1225, and it specifically affirmed the district court's determination that the FCC's closed meetings were *not* " 'informal discussions' among members." 43a, 699 F.2d at 1244. Rather, the court of appeals concluded that the closed meetings were "prearranged conferences held to effectuate public business of the greatest import," which "focus[ed] on concrete issues" and which were "in short, an integral part of the Commission's policymaking processes. . . ." *Id.*

The issue before this Court therefore is whether the Sunshine Act applies to meetings that the FCC's representatives attend in their "official" capacities and "in a negotiating stance," at which they seek, by applying "leverage," to secure a "tit for TAT" or a "*quid pro quo*," and at which they "really mean business." These are the facts that the lower courts had before them—facts that the FCC made a calculated decision not to deny below, and facts that it studiously refrains from addressing in its brief to this Court.

Although the FCC ignores the issue in its brief to this Court, the Sunshine Act unambiguously places the burden of proof on the FCC to demonstrate that its closed meetings were not subject to the Act. The Act expressly provides that in any enforcement action brought in the district court, "[t]he burden is on the defendant to sustain his action." 5 U.S.C. § 552b(h)(1).¹³ Even though it bore this burden, the FCC

13 As the legislative history demonstrates, the Act places the burden of proof on the agency for the logical reason that only the agency is in a position to know what transpired in meetings from which the public is excluded:

The burden of proof is on the agency to sustain its conduct. This is in accord with the presumption of openness established in the bill. *Those*

elected not to submit any evidence in the district court to contradict ITT Worldcom's evidence of what occurred at the closed meetings, and, in response to ITT Worldcom's summary judgment motion, it declined to offer "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P., Rule 56(e). Instead, in what was unquestionably a litigation tactic aimed at avoiding discovery, the FCC agreed that there were no disputes as to material facts and consented to the adjudication of ITT Worldcom's Sunshine Act claim on summary judgment. The factual record before the district court therefore consisted solely of the un rebutted statements on which ITT Worldcom relied that demonstrated the FCC was *not* merely exchanging information "informally" at the closed meetings, but rather was there in a "negotiating stance," "applying leverage," and seeking a "tit for TAT" and a "*quid pro quo*."

Further, the lower court decisions were based not only on the FCC's failure to submit any evidence of its own in answer to the admitted statements on which ITT Worldcom relied, but on the numerous contradictions and inconsistencies in the FCC's orders and its representations to the lower courts. Simply put, the FCC's dilemma in the lower courts was that it could not give a consistent account of what occurred at the closed meetings without fatally compromising its legal position on one or more of the challenges that ITT Worldcom raised to its actions. This dilemma is perhaps best illustrated by the court of appeals' treatment of the post-judgment affidavits that the FCC belatedly submitted in an effort to support its characterizations of the closed meetings. Even at that late stage of the proceedings, after its litigation strategy had failed in the district court, the FCC's carefully crafted affidavits were dismissed by the court of appeals as "vague, conclusory and contradictory," and insufficient to raise a genuine issue of fact.

who wish to operate in secrecy should have to justify it. Furthermore, in most cases the agency will be the only party in possession of information that might justify closing the meeting. The burden must therefore be on the agency to produce any facts that may support its action.

S. Rep. No. 94-354, 94th Cong., 1st Sess. 33 (1975)-(emphasis supplied).

Now that the resolution of ITT Worldcom's Sunshine Act claim is the only issue before this Court on the merits, the FCC has abandoned its efforts to concoct a description of its actions that would somehow be consistent with all of the FCC's legal positions on each of the many issues raised below. Instead, it asserts only those positions that advance its Sunshine Act arguments, ignoring the contradictory positions it took before the lower courts. For example, the FCC no longer feels the need to concede that the members of the Telecommunications Committee attend the closed meetings in their "official" capacities, as it did when it was forced to respond to ITT Worldcom's *ultra vires* claim. It no longer feels the need to concede that the FCC "must attend such conferences" to discharge its regulatory duties, as it did when it was attempting to demonstrate that documents pertaining to the closed meetings were subject to the "deliberative process" privilege of the FOIA. Instead, the FCC's brief in this Court constantly repeats the conclusory assertion that the closed meetings were only "informal," "unauthorized" exchanges of information, as if this repetition could excuse or hide the fact that the FCC made no effort in the lower courts to offer credible evidence that might support this characterization of the closed meetings, the characterization it now embraces in an effort to sustain its legal position in this Court.

In the end, there are few differences between the parties as to the legal principles that govern the application of the Sunshine Act. ITT Worldcom does challenge, however, the FCC's right to disavow facts in this Court that it conceded below. It is simply too late in the day for the FCC to reverse course and contest factually whether it engaged in "formal" or "informal," "authorized" or "unauthorized," activities at the closed meetings. The omissions, inadequacies and contradictions in the factual presentations made by the FCC in the lower courts, resulting as they did from a litigation strategy that the FCC deliberately adopted, are deficiencies of the FCC's own making, and aptly illustrate the truth of Scott's verse, "oh, what a tangled web we weave, when first we practice to deceive." This Court, like the two lower courts, should rule that the FCC has failed to meet its burden to sustain its actions under the Sunshine Act, and affirm.

A. The Telecommunications Committee Was Authorized To Act on Behalf of the Full FCC at the Closed Meetings with the Foreign Administrations.

The requirements of the Sunshine Act are applicable both to the agency itself, and to "any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1). The legislative history of the Act demonstrates that a subdivision is subject to the Act even if it is not authorized to take final action on behalf of the full agency:

A subdivision of an agency . . . is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. Thus, panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of section 552b.

H. Rep. No. 94-880, 94th Cong., 2d Sess. 7 (1976) (hereinafter "*House Report*"). Accord S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975) (hereinafter "*Senate Report*").

The court of appeals based its conclusion that the three members of Telecommunications Committee had been authorized to act on behalf of the full FCC at the closed meetings on three subsidiary determinations: (1) the Telecommunications Committee attended the closed meetings "in their official roles," "in their official capacities," and "*qua* the Telecommunications Committee"; (2) the Committee pursued a goal endorsed by the full FCC of "build[ing] a 'consensus' that will lead ultimately to operating agreements for ITT's competitors"; and (3) upon return from the closed meetings, the Committee's members "convey the information and views 'exchanged' at the meetings to the full Commission for its consideration." 36a-37a, 699 F.2d at 1241; 53a, 699 F.2d at 1249. The FCC does not argue that the court of appeals lacked an adequate basis for these determinations, which are taken in large part from representations in the FCC's appellate brief.

Further, the court of appeals bolstered its conclusion that the Telecommunications Committee was "authorized" to act on behalf of the full FCC by pointing out that the FCC "insists in its rulemaking denial that the Committee's participation in the meetings is necessary for the [FCC] to carry out its statutory duty to regulate international communications," which duty, insofar as it concerns the construction of new international facilities, has been expressly and formally delegated to the Telecommunications Committee. 37a, 699 F.2d at 1241. The rulemaking denial unambiguously demonstrates that the Telecommunications Committee participated in the closed meetings with the authorization of the full FCC and at its direction:

[W]e have undertaken to have Commission representatives meet face to face with them [the foreign administrations] to discuss mutual present and future telecommunications needs. . . . To the extent that these informal discussions can advance our progress toward realizations of statutory goals, they are a necessary and natural corollary of our international licensing authority.

81a-82a (emphasis supplied).

Other FCC statements on which ITT Worldcom relied below indicated that "the Commission must attend" the meetings with the foreign administrations to carry out its regulatory duties. (JA 97.) Certainly Commissioner Fogarty had no doubts about his authority to speak for the entire FCC when he addressed the European administrations at an open meeting in Montreal, which occurred just before the first closed meeting in Dublin:

I think the Commission—I can speak for myself and, I'm sure, for the Chairman, and Mr. Lee, and for the other commissioners who are not present—we want to meet you half way but we do request, I think, that the *quid pro quo* would be

(JA 165.)

Indeed, the FCC never asserted that the Telecommunications Committee was acting unofficially or without its authority

until it was required to respond to ITT Worldcom's summary judgment motion. Having elected not to contest ITT Worldcom on the facts of what actually occurred at the closed meetings, the FCC's only remaining defense to the application of the Sunshine Act was a legal argument that the Telecommunications Committee was not "authorized" to act on its behalf. However, faced with ITT Worldcom's claims that the Telecommunications Committee was engaged in *ultra vires* misconduct, the FCC was forced to take the position below that the members were acting in their "official capacities," 53a, 699 F.2d at 1249, yet without "authorization" from the full FCC. Given the contradictions inherent in the careful distinctions that the FCC sought to draw below, the court of appeals can hardly be criticized for finding that the Telecommunications Committee acted with the full FCC's knowledge, approval and authority.

Despite the lower court's determination that the Telecommunications Committee was indeed "authorized" to act on the full FCC's behalf at the closed meetings, which was based largely on the FCC's own statements to that effect, the FCC argues in this Court that a subdivision can *never* be authorized to act on behalf of the full agency for purposes of the Sunshine Act unless that authorization is conferred pursuant to a formal agency vote and a published rule or order. There is no support for the FCC's argument in the Sunshine Act itself; the statute requires only that the subdivision be in fact "authorized to act on behalf of the agency" and does not require that the authorization be conferred with any particular degree of formality.

Further, in a portion of its decision which the FCC has not challenged in this Court, the court of appeals held that because the FCC refused to acknowledge that the Telecommunications Committee was "authorized" to act on its behalf, the court was compelled to find that the FCC had violated the Communications Act when, in denying ITT Worldcom's rulemaking petition, it declined to delineate the Telecommunications Committee's responsibilities and powers at the closed meetings. The FCC is thus attempting in this Court to justify its failure to

comply with the Sunshine Act by relying on its adjudicated violation of the Communications Act. There is certainly nothing novel about the court of appeal's rejection of this argument and, as the lower court observed, "[t]he applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will." 36a, 699 F.2d at 1240.

In any event, the argument which the FCC makes in this Court ignores the fact that the Telecommunications Committee has a formal, official delegation of authority from the full FCC that is sufficiently broad to apply to all of its actions at the closed meetings, no matter how those meetings are characterized. As described above, the FCC has adopted a published regulation (47 C.F.R. § 0.215) that delegates to the Telecommunications Committee the authority to license new international facilities, which is the basic subject both of the closed meetings and of the traditional Consultative Process meetings.¹⁴

The FCC's brief seeks to characterize the Telecommunications Committee's formally delegated power to rule on construction applications under Section 214 of the Communications Act as completely unrelated to anything which occurs at the closed meetings. According to the FCC, "[i]t has never been suggested that the attending commissioners performed [this] function[] at the Consultative Process." FCC Brief at 18.

14 The court of appeals stated that it would have found this regulation sufficient to "authorize" the Telecommunications Committee's participation in the closed meetings, if the FCC had so contended:

If the Commission argued that the CP exchanges were important to the Committee's discharge of its delegated responsibilities, we might well conclude that no [further] explicit authorization to participate was necessary.

52a, 699 F.2d at 1249. However, because the FCC "adamantly maintained" that the Committee was *not* authorized so to act (to preserve its position on the Sunshine Act), *id.*, the Court of Appeals took the FCC at its word and directed the FCC, on remand in the rulemaking proceeding, to specifically delineate the Committee's authority at the closed meetings.

This statement is simply not true. The undisputed facts below established that the Telecommunications Committee was prepared to barter approval of proposed new communications facilities, which it has delegated authority to grant, for operating agreements for GTE and Graphnet. This was the "tit for TAT" that Commissioner Fogarty sought, and the "leverage" Chairman Ferris told Congress the FCC was applying. Even if this were not the case, however, it would by no means follow that the Telecommunications Committee was acting beyond the scope of its formal delegation of authority when it met with the foreign administrations.

Taking the view of the facts most favorable to the FCC, the FCC concedes that during the closed meetings the Telecommunications Committee "exchanges information and views," albeit "informally," concerning the foreign administrations' future needs for international communications facilities. Indeed, the only explanation the FCC has ever offered for sending the Telecommunications Committee to Europe at the taxpayers' expense is that the information the Committee learns there will assist it in discharging its delegated authority to rule on requests for new facilities. Because the Telecommunications Committee's "information exchanges" are directly related to matters that it has been officially delegated authority to regulate (and, indeed, according to the FCC, those exchanges are absolutely necessary to permit the Committee to discharge this delegated function, *see* JA 97), there can be no real question that the Telecommunications Committee is acting within the scope of its formally delegated authority when it "exchanges information" with the foreign administrations.

The FCC's argument on the authorization point seems to be based on its assertion that the Telecommunications Committee does not formally vote or finally decide any Section 214 applications during the closed meetings. However, this argument confuses the question of whether the Telecommunications Committee is *authorized* to participate in the closed meetings, regardless of what occurs there, with the question of whether the Committee's predecisional "information exchanges" are sufficiently focused and formal to constitute the

joint conduct or disposition of official agency business, a separate issue which is discussed below. *See infra*, pp. 28-33.

In the final analysis, the FCC's claim that the Telecommunications Committee is not authorized to act on behalf of the full FCC is simply incredible. The closed meetings grew out of the Consultative Process, a series of meetings that have been formally endorsed by the FCC and conducted under its aegis for nearly a decade. The three members of the Telecommunications Committee who represent the Commission there were not selected randomly or on an *ad hoc* basis; rather, they are the FCC's chairman and the two other commissioners who, by virtue of their delegated authority, have the greatest direct interest in the subject matters discussed there.¹⁵

Given the controversy that has arisen since the Telecommunications Committee first closed its meetings with the foreign administrations and the extensive attention that this controversy has received from the full FCC as the result of ITT Worldcom's FOIA request, its petition for rulemaking and its lawsuit, it is impossible to believe that the Telecommunications Committee, which continued to meet with the foreign administrations after the controversy arose, has been doing anything during the closed meeting without the rest of the FCC's full knowledge and approval. As the court of appeals concluded, "[w]hatever the actual scope of the Committee's endeavors, there can therefore be no question that they are undertaken 'on behalf of' the Commission." 37a, 699 F.2d at 1241.

B. The Telecommunications Committee Was Engaged in Deliberations That Determined or Resulted in the Disposition of Official Agency Business at the Closed Meetings.

The FCC next argues that its closed meetings with the foreign administrations were not "meetings" for purposes of the Sunshine Act because, according to the FCC, the Telecommunications Committee was not involved in "deliberations"

¹⁵ Indeed, it is no doubt important that the members of the Telecommunications Committee attend the closed meetings personally because only they, with their delegated authority, can assure the foreign administrations that any "deal" they negotiate will be honored by the FCC.

that "result in the joint conduct or disposition of official agency business."¹⁶

At the outset, it must be emphasized that the FCC's argument in this Court depends entirely on its unsupported factual contention that it did nothing more than "exchange information" with the foreign administrations when it met behind closed doors. The FCC does not deny that if it was in fact "in a negotiating stance," applying "leverage," demanding "tit for TAT" and "seeking to move toward consensus," as its representatives admitted in the statements that the FCC chose not to refute in the courts below, the Sunshine Act would be fully applicable to its closed meetings. The FCC's admissions should be dispositive here, just as they were in the lower courts, because they demonstrate that the FCC was not merely engaged in the "conduct of official agency business" within the meaning of the Act, but was, in the words of the court of appeals, conducting "public business of the greatest import" when it met with the foreign administrations. 43a, 699 F.2d at 1244.

Further, even assuming that the FCC had done nothing more than "exchange information" at the closed meetings, the inquiry would by no means be complete. While ITT Worldcom (and the court of appeals) recognize that the Sunshine Act was not intended to apply to all "informal background discussions which clarify issues and expose varying views," *Senate Report* at 19, the overriding goal of the Act is to expose to public scrutiny "not just the formal decisionmaking or voting but all

16 The FCC's brief divides its discussion of this issue into two separate points, one of which addresses the issue of whether the Telecommunications Committee engaged in "deliberations" at the closed meetings, and another which addresses whether those deliberations resulted in the "joint conduct or disposition" of agency business. However, in both of these sections of its brief, the FCC urges the Court to accept the same legal standard drawn from *Berg & Klitzman, An Interpretative Guide to the Government in the Sunshine Act* (1978); i.e., whether the challenged discussion "is sufficiently focused on discrete proposals or issues to cause participants to form reasonably firm views." See FCC Brief at 24-25 and 29. Because ITT Worldcom accepts this common standard and submits that the lower courts correctly applied it, both Points I. B. and I.C. of the FCC's brief are addressed together above.

discussions relating to the business of the agency." *House Report* at 8. "The whole decisionmaking process, not merely its results, must be exposed to public scrutiny." *Senate Report* at 18. The legislative history unambiguously demonstrates that the Act was intended to encompass any information-gathering process that is likely to have a meaningful impact on final agency action.¹⁷

Reference to the FCC's brief demonstrates that the difference between ITT Worldcom and the court of appeals, on one hand, and the FCC on the other, does *not* concern the way in which the Sunshine Act is to be interpreted as a matter of law. The FCC's brief concedes that the Sunshine Act, while not applicable to "freewheeling, wide-ranging and informal discussions," is on the other hand "not confined to gatherings at which final votes are taken." FCC Brief at 27, 37. The FCC thus recognizes that the Sunshine Act applies to proceedings with "some degree of formality," FCC Brief at 25, leading up to final agency action, and proposes the following standard for distinguishing between activities subject to the Act and "informal" discussions outside its application:

The test is whether the discussion is "decision-oriented," that is, "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency."

FCC Brief at 29. ITT Worldcom accepts this quotation from the FCC's brief as an accurate statement of the rule imposed

¹⁷ For example, the legislative history reveals that "[p]anels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the [Act] to open their meetings to the public." *Senate Report* at 17. The Act applies to "meetings outside the agency . . . if they discuss agency business" *Senate Report* at 18, and the Act's open-meeting requirement "does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business." *House Report* at 8.

by the Sunshine Act, and respectfully submits that the court of appeals correctly applied this rule to the facts before it.¹⁸

The court of appeals found that the FCC's closed meetings are "prearranged conferences" that "focus on concrete issues" (i.e., GTE's and Graphnet's needs for operating agreements and the foreign administrations' requests for new international facilities). Further, the subjects discussed at the closed meetings are "pending or likely to arise" before the FCC, because, as the court of appeals found, "[r]eference to the Commission's FOIA materials . . . suggests that a number of pending docket proceedings have in fact been discussed at the CP meetings," 50a, 699 F.2d at 1247, and because the FCC will be required to approve proposed new international facilities discussed at the closed meetings, as well as any new operating agreements that Graphnet and GTE achieve as a result of the FCC's efforts on their behalf.

Finally, the closed meetings are "decision-oriented" and likely to cause the Telecommunications Committee to form "reasonably firm positions" concerning these matters that it must eventually decide pursuant to its delegated authority. As the FCC stated in its order denying ITT Worldcom's rulemaking petition, "[t]he Consultative Process, even where limited to

18 . The test on which ITT Worldcom and the FCC agree is consistent with the Sunshine Act's legislative history, which demonstrates that the requirement that an agency engage in "deliberations" and the joint "conduct" of agency business is not meant to create a rigid or restrictive prerequisite to the application of the Act, but rather is intended to require only that the agency's actions be characterized by a minimal degree of formality before the Act is invoked:

The words "deliberation" and "conduct" were carefully chosen to indicate some degree of formality is required before a gathering is considered a meeting for purposes of this section.

Senate Report at 18. The legislative history contrasts meetings involving deliberations and the conduct of business with "chance encounters," "purely social gatherings," "luncheons" and the like. *Id. Accord House Report* at 3. As will be demonstrated below, the carefully planned international meetings of governmental agencies at issue here bear little resemblance to the unstructured, spontaneous discussions that Congress excluded from the Act's coverage.

a facilities planning format, provides a valuable if not indispensable source of information . . . because it facilitates our predictive judgment as to future communications needs and the solutions to those needs that will be acceptable to other countries. . . ." (79a.) Indeed, as discussed above, the only legitimate reason that the FCC has ever offered for the Telecommunications Committee's participation in meetings with the foreign administrations is that the Committee will use the information and views developed in the meetings to discharge its delegated responsibility to authorize new international communications facilities.¹⁹

The question of whether an agency is informally obtaining "background" information unrelated to any specific issue rather than gathering information as a predicate to decision-making cannot be answered by the FCC's mechanical invocation of the adjective "informal" to describe its activities, without the support of any subsidiary evidence. In the instant case, it is undisputed that the FCC's closed meetings with the foreign administrations are planned well in advance, have a fixed agenda, are addressed to a specific, narrow subject matter (new international facilities and services), are attended by FCC representatives who have delegated authority to act on behalf of the FCC with respect to those matters, and are intended by the FCC to acquire information that the FCC will use as a basis for its final decisions.²⁰ Assuming *arguendo* that

19 The important role that the Consultative Process actually plays in the planning and licensing of new facilities was recognized by the FCC in its decision authorizing the TAT-7 cable. *American Tel. & Tel. Co., supra*, 73 F.C.C.2d at 253-255.

20 The FCC's brief criticizes the court of appeals for allegedly rejecting a definition of the word "deliberation" limited to "weighing and examining proposals that precedes a formal decision by the agency." FCC Brief at 24. Because the FCC's own statements demonstrate that its meetings with the foreign administrations are an integral part of the FCC's policymaking procedures leading up to a formal agency decision on new international facilities, the test which the FCC urges is clearly satisfied. However, it should be noted that the court of appeals correctly held that the Sunshine Act cannot be construed in a way that restricts its applicability to agency action

the FCC did nothing more than "exchange information" at the closed meetings—and at the risk of becoming tiresome, we must reiterate that the evidentiary record is wholly to the contrary—there is no reason for this Court to disturb the court of appeals' conclusion that an "information exchange" with these characteristics is "an integral part of the Commission's policymaking processes." 43a, 699 F.2d at 1244.²¹

C. The FCC's Miscellaneous Arguments Against the Application of the Sunshine Act Are Without Merit.

The FCC argues as Point I.D. of its brief that the closed meetings between the FCC's representatives and the foreign administrations are not meetings "of" the agency, because they are held outside the agency's headquarters, sometimes in Europe, and because they are attended by representatives of the foreign administrations as well as by the Telecommunications Committee. The legislative history of the Sunshine Act demonstrates that the questions of where a meeting is held, and who is present in addition to the agency, are irrelevant if the meeting otherwise falls within the scope of the Sunshine Act:

[T]he mere setting of the gathering is not determinative whether a gathering is a meeting for purposes of this subsection . . . Conference telephone calls and meetings

that results in formal written decisions, and excludes all other instances of the "conduct or disposition of official agency business." As the legislative history cited by the court of appeals establishes, " 'official agency business' encompasses far more than simply 'agency actions' of the sort reviewable under the APA." 38a, 699 F.2d at 1241 (footnote omitted).

21 The *Interpretative Guide*, on which the FCC principally relies, takes the position that "[a] discussion which significantly furthers the decisional process by narrowing issues, discarding alternatives, etc., should be treated as a meeting even though it does not and is not expected to achieve a complete resolution." *Id.* at 10, n.17. The FCC's general counsel has described the purpose of the FCC's meetings with the foreign administrations in remarkably similar terms: "A very significant achievement would be to identify the different approaches being used by the different parties, to narrow differences, and to move toward consensus." (JA 167-68.)

outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the requirements of this subsection. *The test is what the discussion involves, not where or how it is conducted.*

Senate Report at 18-19 (emphasis supplied).

The conduct of agency business is intended to include not just the formal decisionmaking or voting, but *all* discussion relating to the business of the agency. *The limitation of the definition to "joint" conduct . . . does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business.*

House Report at 8 (emphasis partially supplied).

The FCC seems to recognize the clear import of this legislative history, FCC Brief at 37, n. 17, but nonetheless argues that the Sunshine Act should not be applied because the FCC, according to its brief, did not "control" the closed meetings, and therefore allegedly is unable to assure compliance with the Act. The extent of the FCC's "control" over the closed meetings is an issue of fact that the FCC did not attempt to raise below. It is obvious, however, that the FCC seriously understates its ability to "control" the terms and conditions on which its meetings with the foreign administrations are held given the following undisputed facts: (1) the FCC was able to expand the Consultative Process, when it chose to do so, to include the subject of operating agreements for the new carriers, a subject the foreign administrations had shown no interest in discussing, 5a-6a, 699 F.2d at 1225; (2) the FCC's unilateral insistence was sufficient to exclude ITT Worldcom and other interested American parties from the closed meetings; (3) after the district court's decision, the FCC was able to require the foreign administrations to maintain a transcript of the Madrid meeting, to comply with the lower court's order; and (4) after its motion for a stay pending appeal was denied, the FCC hosted a Consultative Process meeting in New Orleans, which was conducted openly in compliance with the Sunshine Act, and which was described in the trade press as

"totally harmonious in tone, and one of the most successful of the series of consultative process sessions which have been held in the past several years." *Telecommunications Reports*, Vol. 47, No. 8, p. 20 (February 20, 1981).²²

Because the FCC must approve new international facilities that the foreign administrations desire, it is the FCC that has "leverage" over the foreign administrations, and not the other way around. There is no reason to assume that the FCC could not convince the foreign administrations to continue the traditional "open meeting" format of the Consultative Process, just as it convinced them to close the meetings when that suited its purposes.

Assuming, however, that the FCC is indeed unable to convince the foreign participants to continue to participate in open meetings, it has no choice but to refrain from authorizing its representatives to conduct official business there. There is nothing in the Act or its legislative history that suggests that an agency may dispense with the procedural safeguards the Act demands simply because a third party with whom the agency wishes to conduct business refuses to comply with the Act's requirements. Congress made a judgment that when an agency is "talking to people in a negotiating stance abroad" or seeking a "*quid pro quo*," it must do so in the sunlight (unless one of the exceptions to the Act applies).²³

The FCC further argues that "strong considerations of policy and practicality" argue against applying the Sunshine Act to its meetings with the foreign administrations because to do so "will severely impede agency consultations with their foreign counterparts. . . ." FCC Brief at 36, 37. The short

22 As ITT Worldcom discussed in its brief in opposition to the petition herein, the relatively infrequent scheduling of Consultative Process meetings since the New Orleans gathering is most likely explained by budgetary restraints and Congressional criticism of the FCC's participation in the Consultative Process. See ITT Worldcom Brief in Opposition at 13-15.

23 It should be noted that the lower court's holding will have no impact on the conduct of the nation's foreign policy because the State Department, which is not a collegial agency, is not subject to the Sunshine Act.

answer to this argument is that Congress decided what this nation's policy should be when it enacted the Sunshine Act, and if, as the court of appeals found, the FCC's meetings fall within the Act's application, it is not for this Court to second-guess this Congressional policy determination. *Miller v. Youakim*, 440 U.S. 125, 142 n. 21 (1979); *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293 (1963). However, the FCC seriously overstates the effect that the decision below will have on its ability to communicate information and views with the foreign administrations, for a number of reasons.

First, the FCC's argument, like so much of the rest of its brief, is premised on the erroneous assumption that the court of appeals' decision applies to "informal" information exchanges. In actual fact, there is nothing in the lower court's holding to prevent the FCC's commissioners, singly or jointly, from attending international symposia, conferences, trade association meetings or other functions not narrowly focused on particular pending matters, at which information and views can be discussed. Second, even with respect to those meetings to which the Sunshine Act applies, the Act does not absolutely require open meetings, but rather recognizes a number of exceptions that permit an agency to close a meeting in appropriate circumstances, including a situation in which "the premature disclosure of [information] . . . would . . . be likely to significantly frustrate implementation of a proposed agency action." 5 U.S.C. § 552b(c)(9)(B).²⁴ Finally, as the FCC itself points out, the Sunshine Act only applies to collegial action by the agency itself, and the Act places no restrictions *whatsoever* on what an individual commissioner, or the FCC's staff, may do or say during any meeting with the foreign administrations,

24 If the FCC were permitted by law to engage in negotiations with foreign governmental agencies, it could presumably have invoked this exception to justify closing its meetings with the foreign administrations, on the grounds that premature disclosure of the parties' negotiating positions would frustrate the negotiations. It could not do so here, however, without effectively admitting ITT Worldcom's allegations that it was engaged in *ultra vires* misconduct.

so there will always be an avenues for full, frank, and uninhibited communications between representatives of the two sides.

ITT Worldcom recognizes that the facts presented to the court of appeals were somewhat unusual, but that is merely a reflection of how far afield the FCC went in its efforts to advance the private interests of GTE and Graphnet. At bottom, all that the court of appeals has held is that the Sunshine Act applies to a case in which the FCC has never adequately explained or disclosed what it was doing at its closed meetings, and in which the available, uncontroverted evidence strongly suggests that the FCC has engaged in *ultra vires* misconduct behind closed doors. It was precisely to bring questionable government activities of this sort into the sunlight that the remedial provisions of the Sunshine Act were enacted, and the court of appeals' decision should be affirmed by this Court.

POINT II: THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT HAD JURISDICTION TO ADJUDICATE ITT WORLDCOM'S CLAIMS THAT THE FCC HAD ENGAGED IN *ULTRA VIRES* MISCONDUCT WHEN IT MET WITH THE FOREIGN ADMINISTRATIONS.

The FCC argues that the court of appeals erred when it held that the district court, rather than the appellate court, had jurisdiction to adjudicate in the first instance ITT Worldcom's allegations that the FCC had engaged in *ultra vires* conduct at its meetings with the foreign administrations. The lower court's holding is, however, a proper application of the well established rule of administrative law that the district courts retain a limited "residual" jurisdiction to review administrative actions that are patently beyond the agency's jurisdiction or power, and that cannot be adequately remedied through statutorily prescribed review procedures.

The FCC first argues that Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), gives the court of appeals jurisdiction to review on direct appeal the legality of the FCC's actions at the closed meetings. ITT Worldcom and the court of

appeals' decision both recognize that the review procedures specified in Section 402(a) are ordinarily exclusive in those situations in which they are applicable. However, the FCC's argument disregards the key fact that Section 402(a) only authorizes direct appeals of final orders of the FCC. See *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 415-16 (1942). Here, however, as the court of appeals pointed out, "the *ultra vires* count requires scrutiny of conduct outside the formal administrative process." 15a, 699 F.2d at 1230. Such conduct did not, and by its nature would not, result in anything which could be described as a final agency "order."

What the Telecommunications Committee in fact accomplished at the closed meetings held in Dublin, Ascot and Madrid does, however, constitute final agency "action," made reviewable by Section 10(c) of the APA, 5 U.S.C. § 704. The proper forum for judicial review of the FCC's activities is therefore the district court, which has "residual" jurisdiction to review all forms of final agency "action" which cannot be brought directly before the court of appeals as a final "order." *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979).²⁵

Although the FCC apparently concedes that actions taken at the closed meetings are not in themselves "orders" that can be reviewed directly by the court of appeals, it argues that the court of appeals should nonetheless have determined whether the FCC had in fact engaged in *ultra vires* conduct when it ruled on ITT Worldcom's appeal from the denial of its rulemaking petition, because ITT Worldcom raised, or could have raised, this issue in the rulemaking proceeding. As the court of appeals observed, this argument "blurs an important distinction between the rulemaking petition and the *ultra vires* count." 14a, 699 F.2d at 1229.

²⁵ The district court has "federal question" jurisdiction to review final agency actions. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). See also, e.g., *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16 (1963); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1157 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 620 (D.C. Cir. 1979); *Ass'n of Bituminous Contractors v. Andrus*, 581 F.2d 853, 857 (D.C. Cir. 1978).

In the rulemaking proceeding, ITT Worldcom did not seek an adjudication as to the legality of the FCC's past conduct, and the rulemaking proceeding did not provide a mechanism by which it could do so. Under the APA, a "rule" is defined as "an agency statement of general or particular applicability and future effect . . .," 5 U.S.C. § 551(4) (emphasis supplied), so the rulemaking proceeding was necessarily prospective in nature. To convince the FCC to adopt the rules it sought, ITT Worldcom was not required to prove that the FCC had done anything wrong in the past, but rather needed only to convince the FCC that its proposed rules were a sensible way of ordering the agency's future conduct. This issue could properly have been raised even if the FCC had never previously met with the foreign administrations, much less negotiated with them.

Further, to the extent that ITT Worldcom raised an issue related to its district court suit in the rulemaking proceeding, it prevailed on that issue before the FCC. The FCC specifically stated in its rulemaking denial that it had no power to negotiate with foreign administrations, which is as clear a statement of the FCC's prospective authority as ITT Worldcom could hope to achieve. ITT Worldcom did not challenge this portion of the FCC's rulemaking denial on appeal and, indeed, it was not a person "aggrieved" which could appeal this aspect of the FCC's decision. See 5 U.S.C. § 702.²⁶

As the court of appeals correctly recognized, the "gravamen of the *ultra vires* count [in the district court] was very different" from ITT Worldcom's rulemaking petition, because ITT Worldcom sought to prove that notwithstanding the FCC's recognition that it lacked the power to negotiate with

26 The fact that ITT Worldcom complained on appeal about other portions of the FCC's rulemaking denial does not convert the rulemaking appeal into a vehicle to review the question of whether the FCC had power to "negotiate," a point on which ITT Worldcom and the FCC were in agreement. Surely the FCC would not argue that if it had chosen to grant the rulemaking petition *in full*, leaving ITT Worldcom nothing from which to appeal, it could effectively preclude judicial review of what had actually happened at the closed meetings it had already held.

the foreign administrations, the FCC "has *in fact* secretly exceeded its authority and will not admit to having done so." 14a, 699 F.2d at 1229. The question of what the FCC had in fact done at its closed meetings, and whether that conduct exceeded its statutory authority, is separate and distinct from the question of whether the FCC acted arbitrarily and capriciously in declining to adopt procedural rules to govern its future conduct, which was the issue before the lower court on appeal from the rulemaking denial. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, ___ U.S. ___, 103 S.Ct. 2856, 2866 (1983).

The FCC could not magically transform final agency "action" that occurred outside the formal agency process into a final agency "order" within the court of appeals' jurisdiction through the simple expedient of adopting the rulemaking denial after the lawsuit in the district court had already begun. Nor could it do so by gratuitously stating in the rulemaking denial that it had engaged in no improper conduct—a statement that was undoubtedly included in the rulemaking denial for the sole purpose of supporting the FCC's argument that its actions should be reviewed in the court of appeals, where there would be no record of its misconduct, rather than in the district court, where ITT Worldcom would be able to develop such a record through pretrial discovery.²⁷

Furthermore, even if the FCC's actions at the closed meetings could somehow be characterized as "orders" that the court of appeals could review, Section 10(b) of the APA expressly authorizes resort to the residual jurisdiction of the district court when the statutorily prescribed review procedure is *inadequate*. 5 U.S.C. § 703. Here, the court of appeals properly held that the record on the rulemaking appeal was

27 In this Court, the FCC seeks to characterize ITT Worldcom's action in the district court as a "collateral attack" on the FCC's rulemaking denial. In actual fact, the rulemaking denial was a "collateral attack" on ITT Worldcom's complaint, since the only thing that convinced the FCC to act on ITT Worldcom's petition for rulemaking was its desire to "enhance the Commission's litigation posture in the district court action." 50a, 699 F.2d at 1247-48. See *supra*, p. 11.

"patently inadequate" to permit the court of appeals to determine the legality of the FCC's actions:

We are asked, in essence, to approve of actions about which we know almost nothing. The record consists simply of the Commission's assertions that it has not negotiated, and of numerous statements by agency members that would appear to undercut these assertions. Self-serving representations are no substitute for an adequate record that would enable us to determine with confidence the actual scope of the Commission's endeavors.

48a-49a, 699 F.2d at 1247. It would have been literally impossible for ITT Worldcom to prove allegations of *ultra vires* misconduct, without any "pretrial" discovery, in the notice-and-comment rulemaking proceeding before the FCC. The court of appeals therefore held that "the jurisdiction of the district courts is properly invoked" because "*de novo* judicial factfinding is necessary for a fair examination of the disputed issues." 14a, 699 F.2d at 1229 (footnote omitted).²⁸

The FCC's brief criticizes the court of appeals' reliance on the need for *de novo* fact-finding and the creation of an evidentiary record as determining factors in deciding that the FCC's activities at the closed meetings are agency "actions"

28 Not only was the record created by the rulemaking proceeding "patently inadequate" to permit ITT Worldcom to prove its claims that the FCC was engaged in *ultra vires* conduct, the rulemaking proceeding was inadequate to give ITT Worldcom the full measure of relief that it could obtain in the district court. Assuming *arguendo* that the FCC had adopted the procedural rules that ITT Worldcom sought, the FCC would remain free to modify them or make exceptions to them in particular circumstances. By contrast, if ITT Worldcom proved in the district court that the FCC had engaged in *ultra vires* conduct, it could obtain an injunction against the repetition of that conduct that the FCC could not unilaterally modify, and that could be enforced by contempt. Further, once it was determined precisely what the FCC had done in the closed meetings that had already occurred, the district court would have the power to order the FCC to take appropriate remedial action such as, for example, advising the foreign administrations that it expressly disavowed specific threats made at the meetings.

reviewable in the district court, rather than agency "orders" directly appealable to the court of appeals. However, the court of appeals is not alone in its assessment of the importance of these factors. As Professor Davis has observed:

One basic belief of most federal judges is that district courts should have jurisdiction to review when review involves the taking of evidence, and that courts of appeals should normally have jurisdiction to review in other cases

....

4 Davis, *Administrative Law Treatise*, § 23.3 at 131 (2d ed. 1983).²⁹

As Professor Davis goes on to observe, "the tension between that basic idea and some of the statutory provisions [which on their face require a different distribution of jurisdiction to review agency actions] has produced some complex law. . . ." *Id.* As illustrated by this Court's decision in *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980), when Congress unambiguously confers on the courts of appeal jurisdiction to hear direct appeals of final agency "actions," and thus makes those courts' appellate jurisdiction coextensive with the administrative review provisions of the APA, the courts have no choice but to hold that the courts of appeal must entertain such appeals, regardless of how meager the administrative record may be. However, as Justice Rehnquist pointed out in his dissent in that case, "absent any clear indication to the contrary, the [review] statute should not be construed as creating a broad expansion of the jurisdiction of the federal courts of appeal," particularly when an expansive reading "is thor-

29 See, e.g., *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531, 533-34 (D.C. Cir. 1980), cert. denied, 450 U.S. 912 (1982); *Inv. Co. Inst. v. Bd. of Governors*, 551 F.2d 1270, 1278 (D.C. Cir. 1977); *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973); *Ind. Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 143 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971). See also Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 57 (1975).

oughly inconsistent with the traditional role of appellate courts." 446 U.S. at 600.

Unlike the statutory scheme that was before the Court in *Harrison*, the Communications Act distinguishes between final "orders" that are appealable to the courts of appeal, and final agency "actions" that are not directly appealable to those courts. The Act therefore achieves the optimal division of the reviewing function suggested by Professor Davis, by giving the court of appeals power to review formal FCC "orders" resulting from the traditional administrative process and based on a record adequate for judicial review, while leaving residual jurisdiction in the district court to examine irregular agency "actions" outside the administrative process that cannot be evaluated without *de novo* fact-finding.

The FCC's brief raises the spectre that recognizing any residual jurisdiction in the district courts "offers regulated parties yet another tool for disrupting the administrative process by bringing time-consuming collateral attacks on agency decisions." FCC Brief at 48. This argument ignores the fact that the district court's exercise of its residual jurisdiction is severely circumscribed by the interrelated doctrines of exhaustion of administrative remedies, finality, and ripeness. *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 620 (D.C. Cir. 1979). In the absence of exceptional circumstances, these doctrines preclude interlocutory judicial interference with on-going administrative proceedings, and, of course when those proceedings culminate in a final agency "order," review will be available only in the court of appeals.³⁰ The District of Columbia Circuit has recognized that as the result of the application of these doctrines, a plaintiff will not be able to obtain relief in the district court "without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed

30 As to finality and ripeness generally, see *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980). As to exhaustion of administrative remedies, see *McKart v. United States*, 395 U.S. 185 (1969).

method of review." *Nader v. Volpe*, 466 F.2d 261, 266 (D.C. Cir. 1972) (footnotes omitted). *Accord Gulf Oil Corp. v. DOE*, 663 F.2d 246 (D.C. Cir. 1981).

Even though the FCC is well aware of the doctrines of ripeness, finality and exhaustion of remedies, and, indeed, argued unsuccessfully below that those doctrines barred ITT Worldcom's district court action,³¹ its brief to this Court simply ignores the broad protection these doctrines provide from potentially disruptive "collateral" or "interlocutory" challenges to routine agency actions that take place within the normal administrative process. Instead, the FCC urges here what is in effect an absolute rule that the district court has no jurisdiction whatsoever over its actions, regardless of how egregious the circumstances may be. The FCC does not argue that the alleged absence of district court jurisdiction in this case turns on the happenstance that ITT Worldcom voluntarily attempted, in its rulemaking petition, to obtain some measure of relief from the FCC before bringing suit. The FCC asserts that even if ITT Worldcom had not done so, the district court would nonetheless have had no choice but to dismiss its complaint, and *require* ITT Worldcom to proceed before the agency, by rulemaking petition or request for declaratory ruling, until ITT Worldcom obtained a "final order" reviewable only in the court of appeals. FCC Brief at 44, n.24.³²

31 The court of appeals rejected the FCC's argument that the Telecommunications Committee's actions at the closed meetings were not final or ripe for judicial review. 20a, 699 F.2d at 1232. Although the FCC argued in the district court that ITT Worldcom had failed to exhaust its administrative remedies, it did not press this argument on appeal, and the court of appeals found it unnecessary to address it. 21a, 699 F.2d at 1233, n. 73.

32 Interestingly, the FCC argues that such a dismissal by the district court should be based on the "primary jurisdiction" doctrine. That doctrine however, is intended to apply when issues within an agency's regulatory jurisdiction arise in a suit *to which the agency is not a party*. The doctrine is intended, *inter alia*, to avoid the possibility that the court, in adjudicating the suit without the benefit of the agency's views, will reach a result that conflicts with the regulatory goal the agency is pursuing. *See, e.g., Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *United States v. Western Pacific R. Co.*, 352 U.S. 59, 65 (1958). The doctrine has no

Acceptance of the FCC's argument that a party aggrieved of *ultra vires* agency actions must in all cases obtain a "final order" from the agency, judging itself innocent of the alleged misconduct, before that party can seek judicial relief would significantly rewrite established administrative law. It would overturn the well recognized exceptions to the exhaustion, finality, and ripeness doctrines that, as the lower courts recognized, allow a party in ITT Worldcom's predicament to go immediately to the district court. See *McKart v. United States*, 395 U.S. 185, 193 (1969) (exhaustion doctrine is "subject to numerous exceptions").³³ It would overrule prior decisions of this Court, which establish that even in an administrative proceeding that will ultimately result in a final order reviewable in the court of appeals, the district court may in appropriate circumstances intervene to enjoin administrative actions patently in excess of the agency's jurisdiction or power. *Leedom v. Kyne*, 358 U.S. 185 (1958); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963).³⁴ And it would ignore this

applicability when the agency itself is *the defendant* in the lawsuit, in which case the appropriate question is whether the finality, ripeness, or exhaustion doctrines preclude the suit. The FCC's reliance on a primary jurisdiction argument in this Court would seem to be a calculated effort to avoid the question of whether these three doctrines apply, an argument it lost in the lower courts.

33 For example, when allegations of patently *ultra vires* administrative conduct are made, exhaustion of administrative remedies is generally not required. See *Ass'n of Nat'l Advertisers, Inc. v. FTC*, *supra*, 617 F.2d at 621; *Nader v. Volpe*, *supra*, 466 F.2d at 267. Further, the exhaustion doctrine does not apply unless a party has an *adequate* administrative remedy. See *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 540 (1954). ITT Worldcom did not have an adequate remedy at the FCC, because the FCC continued to schedule more closed meetings with the foreign administrations even after ITT Worldcom's rulemaking petition and FOIA request were submitted to the agency. In such a case, the finality and ripeness doctrines will not bar relief if the issues are fit for immediate judicial resolution and withholding court consideration would work a hardship on the parties. *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. at 148-49. See 20a, 699 F.2d at 1232.

34 As the court of appeals recognized, the principles of the *Leedom* case are *a fortiori* applicable here, because the court was not asked to

Court's admonition that Congress's statutory specification of review procedures for certain kinds of agency actions, such as FCC "orders," should not be construed to prevent review in the district court of other forms of final action not covered by the statute. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

While the residual jurisdiction of the district courts is, as ITT Worldcom recognizes, narrow and sparingly applied, that jurisdiction is absolutely essential to remedy *ultra vires* agency conduct outside the normal administrative process that cannot be adequately corrected on appeal from a subsequent "final order." In reaching its result in this case, the court of appeals was careful to point out that its decision was not intended to sanction review in the district court of an action that "is interlocutory in nature and can be corrected on court-of-appeals scrutiny of a subsequent, final action." 16a, 699 F.2d at 1230 (footnote omitted). The court of appeals held, however, that effective future review was not possible here because the FCC's activities at the closed meetings "are not calculated to result in a final order, but rather to lead to unreviewable actions by foreign administrations." *Id.*

In short, the court of appeals permitted district court review of the FCC's actions in this case only because (1) the actions themselves do not constitute a "final order" reviewable in the court of appeals, and (2) the court of appeals will not have an opportunity to determine the legality of the FCC's conduct on appeal from any future final order. The court of appeals' recognition of this limited residual jurisdiction in the district court will not, as the FCC argues, disrupt the functioning of the administrative process but, to the contrary, is necessary to effectuate this Court's holdings that adequate judicial review is presumptively available to all aggrieved parties. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

intervene in an agency proceeding that would eventually result in a final order reviewable in the court of appeals, but rather ITT Worldcom sought to enjoin misconduct that would never lead to a reviewable final order. 16a, 699 F.2d at 1230, n. 59. See generally *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1067-68 (5th Cir. 1971).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GRANT S. LEWIS

*Counsel of Record for Respondent
ITT World Communications Inc.*

520 Madison Avenue

New York, New York 10022

(212) 715-8000

Of Counsel:

JOHN S. KINZEY

MARY JO EYSTER

CHARLES C. PLATT

LEBOEUF, LAMB, LEIBY & MACRAE

—and—

HOWARD A. WHITE

SUSAN I. LITTMAN

ITT WORLD COMMUNICATIONS INC.

100 Plaza Drive

Secaucus, New Jersey 07096

(201) 330-5000

February 24, 1984

STATUTORY APPENDIX

Section 10(b) of the Administrative Procedure Act, 5 U.S.C. § 703, provides:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

No. 83-371

In the Supreme Court of the United States

OCTOBER TERM, 1983

**FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS**

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

BRUCE E. FEIN
*General Counsel
Federal Communications Commission
Washington, D.C. 20554*

TABLE OF AUTHORITIES

Cases:	Page
<i>AT&T Co., In re</i> , 73 F.C.C.2d 248	11
<i>Berenyi v. INS</i> , 385 U.S. 630	1
<i>Leedom v. Kyne</i> , 358 U.S. 184	13
<i>Whitney National Bank v. Bank of New Orleans</i> , 379 U.S. 411	12
<i>Writers Guild of America, Inc. v. America Broad- casting Companies, Inc.</i> , 609 F.2d 355, cert. de- nied, 449 U.S. 824	14
Statutes, regulations and rules:	
Government in the Sunshine Act, 5 U.S.C. 552b:	
5 U.S.C. 552b(a) (1)	5
5 U.S.C. 552b(a) (2)	9
5 U.S.C. 552b(b)	10
5 U.S.C. 552b(c)	10
5 U.S.C. 552b(h) (1)	4
Communications Act, 47 U.S.C. 151 <i>et seq.</i> :	
47 U.S.C. 214(a)	6
47 U.S.C. 402(a)	12
47 C.F.R. (1982):	
Section 0.4	5
Section 0.215	5, 6
Section 0.291	5
Section 1.2	12
Fed. R. Civ. P. 56(c)	4
Miscellaneous:	
49 Fed. Reg. (1984):	
p. 6907	5
p. 6908	5
S. Rep. 94-354, 94th Cong., 1st Sess. (1975)	11

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-371

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. ITT attempts to portray this case as one whose decision hinges entirely on district court findings, urging affirmance on the ground that this Court "cannot undertake to review concurrent findings of fact of two courts below in the absence of a very obvious and exceptional showing of error." ITT Br. 19 (citing *Berenyi v. INS*, 385 U.S. 630, 635 (1967)). This portrait bears little if any resemblance to the actual physiognomy of the proceedings below.

As noted in our opening brief (Gov't Br. 8-10), the district court decided the Sunshine Act issue on cross

motions for summary judgment. In support of its motion, ITT submitted a "Statement of Material Facts" (J.A. 170-172), contending that "the following facts establish[ed] that [it was] entitled to judgment in its favor as a matter of law": (1) its exclusion from the Dublin Consultative Process session; (2) its exclusion from the Ascot Consultative Process session; and (3) the fact that certain "statements [had been] made by the FCC and its representatives at, or with respect to, their meetings."¹ The FCC replied (J.A. 173) that it had "[n]o objection" to these three factual allegations, acknowledging that the passages ITT quoted were "true copies" (J.A. 171) of statements the FCC or its representatives had made. In acknowledging that the quotations were accurate, of course, the Commission was not signalling its agreement with the various inferences of wrongdoing ITT sought to draw from the statements.

Apart from these (relatively few) undisputed facts, the facts before the district court—especially regarding "[t]he specific nature of [the] off-the-record discussions" in Dublin and Ascot—were, as the court of appeals put it, "sharply contested" (Pet. App. 6a). The FCC contended that the discussions involved an "informal exchange of views," and there was considerable evidence in the record to support that contention.² ITT contended that the discussions

¹ These statements, nine in number, are discussed at page 9 note 4 of our opening brief, and are reprinted in full at J.A. 164-169.

² ITT repeatedly asserts (Br. 2-3, 7, 15, 17, 29, 32-33) that "there is not a shred of admissible evidence in the record" to support the FCC's characterization of the Dublin and Ascot discussions as an "informal exchange of views." This asser-

involved impermissible "negotiations," basing this argument on inferences from the statements referred to above (J.A. 164-169, 171-172). Despite these factual uncertainties, the FCC agreed for purposes of summary judgment that "there [were] no *material* facts in dispute" (J.A. 173 (emphasis added)), taking the position that the multinational sessions were not "meetings of the FCC" as a matter of law, regardless of what the attending Commissioners actually did there.

ITT would have this Court believe that the district court, in granting summary judgment, resolved all contested factual issues in ITT's favor, on the basis either of explicit findings or of FCC concessions. See, *e.g.*, ITT Br. 3, 7, 14, 17, 21, 27, 37. The record does not support this assertion. The district court made no findings of fact at all; it merely drew the legal conclusion that the components of a Sunshine Act "meeting" had been satisfied. See Pet. App. 65a-

tion is untrue. As noted in our opening brief (Gov't Br. 4-8), the FCC in support of its characterization relied, not only on its own public pronouncements (Pet. App. 70a-87a; J.A. 92), but on the historical format of the Consultative Process (Pet. App. 79a-82a), transcripts of open FCC meetings (J.A. 159), summaries of closed Consultative Process sessions (J.A. 128-129), communications between FCC personnel and their European counterparts (J.A. 78, 80, 87), statements of individual Commissioners (J.A. 52) and statements of European participants (J.A. 128). All this evidence was in the record before the district court. In addition, the FCC relied on affidavits of one of the attending Commissioners (J.A. 175-176) and of the Assistant Bureau Chief (International) of its Common Carrier Bureau (J.A. 177-179), which were introduced into the record in connection with the FCC's applications for a stay.

66a.³ And although the district court did not say what facts it relied on, the court must (in accordance with proper summary judgment procedure) have relied either on the (relatively few) uncontested facts described above, or on a view of the contested facts in the light most favorable to the FCC.

It is our contention that the district court, in granting summary judgment for ITT, and the court of appeals, in affirming that award, could have done so only in reliance upon an erroneous interpretation of the Sunshine Act. It is likewise our contention that, upon a correct interpretation of the statute, the district court was required—on the basis of the undisputed facts before it—to award summary judgment in favor of the Commission.⁴ We will now ex-

³ ITT twice asserts (ITT Br. 16-17, 20) that the court of appeals "specifically affirmed the district court's determination" that the Consultative Process did not involve "informal discussions." The district court made no such determination; indeed, the word "informal" does not appear in its opinion (see Pet. App. 65a-66a). The court of appeals, in concluding (Pet. App. 43a) that the multinational sessions "[were] not 'chance meetings,' 'social gatherings,' or 'informal discussions' among members," was quoting, not the district court, but a statement by Representative Abzug on the House floor in 1976. See Pet. App. 43a n.172. Representative Abzug was not talking about the Consultative Process.

⁴ As ITT properly observes (ITT Br. 20-21 & n.13), the FCC had the burden of proving that the Dublin and Ascot sessions were not subject to the Sunshine Act's open meeting rules. See 5 U.S.C. 552b(h) (1). A motion for summary judgment will be granted, however, if the papers before the district court "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We contend that the Consultative Process sessions were not "meetings of the FCC" as a matter of law.

plain why ITT's brief does not shake our confidence in the correctness of these contentions.

2.a. The Consultative Process sessions could be deemed "meetings" for Sunshine Act purposes only if the attending Commissioners were "authorized to act on behalf of the agency" there (5 U.S.C. 552b(a)(1)). ITT makes two arguments in support of the court of appeals' conclusion that they were so authorized. Neither argument has merit.

First, ITT contends (ITT Br. 26) that the attending Commissioners, as members of the FCC's Telecommunications Committee,⁵ had "a formal, official delegation of authority" to act on behalf of the full Commission at the Consultative Process. As we have noted earlier (Reply Mem. 7), ITT made this argument, for the first time, in its brief in opposition to our petition for a writ of certiorari (Br. in Opp. 20). Neither of the courts below discussed or relied on this argument. Indeed, the court of appeals acknowledged that the attending Commissioners had received no formal delegation of authority, hypothesizing that an unofficial delegation had been illegally conferred. See Pet. App. 36a, 53a; Gov't Br. 18.

⁵ The FCC abolished its two standing committees, including the Telecommunications Committee, effective February 24, 1984. 49 Fed. Reg. 6907 (1984). The Commission found that, "[w]ith the reduction in the number of commissioners from seven to five, and with the increase in applications as a consequence of new entry, the Telecommunications Committee procedures of the past are unnecessary." *Ibid.* The FCC's delegation orders were accordingly revised to delegate to the Chief, Common Carrier Bureau, authority previously delegated to the Telecommunications Committee. 49 Fed. Reg. 6908 (eliminating 47 C.F.R. 0.4 and 0.215, and amending 47 C.F.R. 0.291).

In any event, ITT's contention is as insubstantial as it is belated. The argument is premised on 47 C.F.R. 0.215, which, as noted previously (Gov't Br. 17-18), formerly delegated to the Telecommunications Committee authority to pass "upon all applications or requests * * * submitted under Section[] 214 of the Communications Act" where the estimated cost of construction exceeded \$10 million. Section 214 requires common carriers to obtain a "certificate of public convenience and necessity" before starting construction of new communications facilities, whether interstate or international. 47 U.S.C. 214(a).

ITT does not appear to suggest that the attending Commissioners were literally engaged in "licens[ing] new international facilities" (ITT Br. 26) when they discussed trans-Atlantic communications matters in Dublin, Ascot, or Madrid.⁶ Rather, it contends that the Committee's delegated authority was "sufficiently broad to apply to all of its actions" at the Consultative Process, on the theory that the Commissioners would gain information there that would be "directly related to" and might "assist [them] in discharging" their duties to act on *future* applications for construction permits, when and if submitted. *Id.* at 26, 27.

This argument proves too much. FCC Commissioners gain information that assists them in discharging their licensing authority, and that could be described

⁶ ITT does assert (ITT Br. 27) that "[t]he undisputed facts below established that the Telecommunications Committee was prepared to barter approval of proposed new communications facilities, which it ha[d] delegated authority to grant, for operating agreements for [Telenet] and Graphnet." As noted above (see pages 2-4, *supra*), the "undisputed facts" established no such thing, and the courts below made no such finding.

as "directly related" to their discharge of that authority, when they inspect facilities, read trade publications, converse with lawyers, consult with economists, or attend antitrust seminars. But it could scarcely be contended that they thereby exercise their authority to approve certificate or license applications. On ITT's theory, a Commissioner would be deemed to be acting on applications for certificates of public convenience and necessity when he or she reads the *Washington Post* over breakfast.

Secondly, and alternatively, ITT follows the court below in contending that the FCC "violat[ed] the Communications Act" (ITT Br. 26) by making an unofficial and "unlawful" (*id.* at 18) delegation of authority to the attending Commissioners. ITT ignores our arguments that the notion of an "unofficial delegation of authority" is unprecedented (Gov't Br. 18), that an inference of illegal delegation is contrary to the "presumption of regularity" accorded agency action (*id.* at 18-19), that the Sunshine Act presupposes a formal delegation of power (*id.* at 19-20), and that an "unofficial delegation" theory would make it impossible to administer the Act's prospective rules (*id.* at 23-24). ITT seems to have abandoned the lower courts' primary rationale, *i.e.*, that "unofficial delegation" could be inferred from the supposed fact that the attending Commissioners were "authorized to submit recommendations" to the FCC upon their return. Pet. App. 37a-39a; see Gov't Br. 21-23. At bottom, ITT seeks to predicate an inference of sub rosa delegation on the facts that the Commissioners attended the Consultative Process "in their official roles" (ITT Br. 23), that they attended as FCC "representatives" with the Commission's "knowledge [and] approval" (*id.* at 24, 25, 28), and

that their attendance was important to realization of the FCC's regulatory objectives (*id.* at 24).

This argument again proves too much. The conditions ITT specifies will typically be met whenever agency members converse with people outside their office during the course of a working day. If satisfaction of those conditions sufficed to prove that agency personnel were "authorized to act on behalf of the agency," the Sunshine Act's open meeting rules would have virtually limitless application.

In sum, because the Sunshine Act presupposes an official delegation of authority—a delegation not conferred here—the attending Commissioners were not "authorized to act on behalf of the agency" at the Consultative Process, and those sessions were not "meetings" of the FCC, as a matter of law. The Commission was thus entitled to summary judgment on the Sunshine Act issue. This Court need go no further to decide the question.⁷

b. Even if the attending Commissioners could somehow be regarded as having been "authorized to act on behalf of the [FCC]" at the Consultative Process, those sessions would not be Sunshine Act

⁷ ITT twice asserts (ITT Br. 18, 29) that "[t]he FCC does not deny that if it was * * * 'in a negotiating stance' * * *, as it admitted below, the Sunshine Act would be fully applicable." To the contrary, we do deny this assertion, and deny it on two distinct levels. The FCC did not "admit[] below" that it was "in a negotiating stance" at the Consultative Process; the FCC consistently maintained the reverse, and ITT in support of its charge relied on an off-hand comment by Commissioner Washburn that was quoted out of context. See Gov't Br. 9 n.4. More importantly, it is our position that the Sunshine Act would not apply even if the attending Commissioners were "in a negotiating stance," since, as a matter of law, they had not been delegated authority to "negotiate" and since, as a matter of law, the sessions in any event were not "meetings of the FCC." See pages 10-11 *infra*.

"meetings" unless they entailed "deliberations" that "determine[d] or result[ed] in the joint conduct or disposition of official [FCC] business" (5 U.S.C. 552b(a)(2)). In our opening brief (Gov't Br. 24-33), we examined the evolution of the statute's language, as well as its legislative history. We showed that Congress used the word "deliberations" in its dictionary sense to mean "consideration and discussion of alternatives before reaching a decision" (*id.* at 24), and that Congress used the phrase "determine or result in the joint conduct or disposition of official agency business" to reach only those discussions that "effectively predetermine official action" on concrete proposals pending or likely to arise before the agency (*id.* at 29). We concluded that ITT had introduced no evidence sufficient to create a triable issue as to whether the Consultative Process sessions were "meetings" under this standard.

ITT in its brief does not come to grips with the statute's language or legislative history. Rather, it simply asserts that the Sunshine Act's open meeting rules were "intended to encompass any information-gathering process that is likely to have a meaningful impact on final agency action" (ITT Br. 30; see *id.* at 32-33). But the purpose of the Sunshine Act, as expressed in its preamble, was to open agencies' "decisionmaking processes," not their information-gathering processes, to public view. See Gov't Br. 15, 32. Government officials gather information in countless ways. On ITT's theory, the Act would apply to dinner conversations, working lunches, and discussions around the water cooler, so long as some federal judge could be persuaded that the conversation was "likely" to have a "meaningful impact" on some agency action. As we have demonstrated earlier (Gov't Br. 28-29, 32-33), Congress did not intend the Act's open meeting rules to have such boundless scope.

c. Even if the Consultative Process sessions were "meetings," they would not trigger the Sunshine Act's coverage unless they were "meetings of [the FCC]" (5 U.S.C. 552b(b)). In our opening brief (Gov't Br. 34-36), we analyzed the statute's language and structure to show that a meeting is an "agency meeting" (5 U.S.C. 552b(c)) only if it is run by, and within the unilateral control of, the agency in question. We explained that the attending Commissioners were in no position to control the multinational conferences involved here.

While appearing to accept our interpretation of the statute, ITT contends (ITT Br. 34) that "[t]he extent of the FCC's 'control' over the closed meetings is an issue of fact." Noting that the foreign administrations sometimes accommodated the attending Commissioners' views on other matters, ITT asserts that "[t]here is no reason to assume that the FCC could not convince [them]" to let the gatherings be covered by the Government in the Sunshine Act (*id.* at 34, 35).⁸

ITT seeks to have this question—like every other question concerning the Sunshine Act's application—be resolved by trench warfare over the facts. But this mode of decisionmaking is calculated to facilitate harassment of regulatory agencies and to make administration of the Act's prospective rules impossible

⁸ In making this point, ITT says that the Commissioners might have persuaded the foreign administrations "to continue the traditional 'open meeting' format of the Consultative Process" (ITT Br. 35; see *id.* at 7). This statement, to the extent it suggests that Consultative Process sessions were traditionally open to the public, is misleading. As we have noted earlier (Gov't Br. 5), the Consultative Process had never been open to the public, but only to invited carriers, and European participants objected to general public participation (J.A. 177-178).

(see Gov't Br. 23-24). In our view, the question whether agency members "control" a meeting should be answered, not by minute inquiry into the dominant or submissive characteristics of the participants' psychological make-up, but by a commonsense and objective evaluation of the terms on which the meeting is held.

Here, the discussions were held on foreign soil, hosted by foreign governments, and attended by foreign officials who outnumbered the attending Commissioners and equalled them in rank. The whole point of the Consultative Process was to enable "foreign entities [to] participate without being subjected 'to U.S. regulatory jurisdiction in fact or appearance.'" Pet. App. 79a, quoting *In re AT&T Co.*, 73 F.C.C.2d 248, 254 (1979). Because the attending Commissioners did not have unilateral control over the Consultative Process, they could not dictate that the sessions be governed by U.S. law, and this inherent lack of power cannot be gainsaid by speculating about how "convinc[ing]" their oratory might have been. In short, because the terms under which the sessions were held established per se that they were not "meetings of the FCC," the Commission was entitled to summary judgment as a matter of law.⁹

3. Our position on the jurisdictional issue is fully set forth in our opening brief (Gov't Br. 38-48).

⁹ ITT contends that, if the foreign administrators would not agree to have their meetings governed by U.S. law, the FCC would have had "no choice but to refrain" from letting its Commissioners attend (ITT Br. 35). As noted in our opening brief (Gov't Br. 35), however, such a result would convert the Sunshine Act's procedural rules into a substantive restriction on FCC action, contrary to Congress's explicit intent not to "change[] the substantive laws governing * * * any agency." S. Rep. 94-354, 94th Cong., 1st Sess. 1 (1975). ITT makes no response to this argument.

ITT's arguments on this score merit several comments:

a. We have argued that the jurisdictional issue is controlled by this Court's decision in *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411 (1965). See Gov't Br. 39, 40, 43 & n.22, 44-45 n.24, 47-48. ITT does not mention this case in its brief.

b. ITT's main argument for district court jurisdiction of its ultra vires claim (ITT Br. 38, 43) is that the Consultative Process would not yield any "final agency order" reviewable by the court of appeals under 47 U.S.C. 402(a). We of course agree (Gov't Br. 48 n.28) that the Consultative Process would not itself yield any "final order" subject to judicial review. Our position is that ITT had already presented (or could have presented) its ultra vires claim to the FCC in a proceeding that *would* yield a final order subject to judicial review, and that statutory review in the court of appeals under Section 402(a) was thus exclusive.

c. ITT appears to accept our contention (Gov't Br. 41-42 & n.20) that its rulemaking petition *presented* the ultra vires claim to the Commission. See ITT Br. 11. ITT nevertheless asserts (*id.* at 39, 41 & n.28) that it could not have obtained complete relief with respect to that claim in the context of a notice-and-comment rulemaking proceeding. We doubt that this is true (see Gov't Br. 41-43), and, if true, whether it would affect the jurisdictional outcome. But in any event, as we pointed out in our opening brief (*id.* at 43-44), ITT could have eliminated any uncertainty on this score by filing with the FCC a motion for a declaratory ruling (see 47 C.F.R. 1.2) concerning the legality of the attending Commissioners' conduct. Judicial review of such a declaratory ruling would likewise have lain in the court of ap-

peals (see Gov't Br. 44 & n.23), and the court of appeals, if it agreed with ITT's contention that ultra vires conduct had occurred, would have had power to afford ITT complete relief. See ITT Br. 41 n.28. ITT does not address the availability of a declaratory ruling.

d. ITT appears to argue (ITT Br. 19, 37, 43-44, 45 & n.33) that the district court's jurisdiction could be sustained under the "patent violation" doctrine of *Leedom v. Kyne*, 358 U.S. 184 (1958). This Court there upheld district court jurisdiction to set aside agency action "in excess of [the agency's] delegated powers and contrary to a specific provision" in the agency's organic statute. 358 U.S. at 188.

ITT did not rely on the "patent violation" doctrine in either court below. The district court noted the doctrine's existence, but "seriously doubt[ed] that ITT could meet this standard" (Pet. App. 62a). The court of appeals adverted to the doctrine, but held it "inapposite to the instant controversy" (Pet. App. 16a-17a n.59). The lower courts' reservations were well founded, since the Commissioners' attendance at the Consultative Process plainly did not violate any clear statutory prohibition or constitute a patent violation of the FCC's authority. Even if it were proper to consider ITT's "patent violation" charge at this stage, therefore, the doctrine would not support district court jurisdiction on the facts presented here.

e. While appearing to agree with our contention (Gov't Br. 44-45 n.24, 47) that the "primary jurisdiction" doctrine would otherwise be relevant, ITT asserts (ITT Br. 44-45 n.32) that the doctrine is inapplicable on the facts presented here because the FCC is a party. In ITT's view, the primary jurisdiction doctrine "has no applicability when the agency itself is the *defendant* in the lawsuit" (*id.* at 45 n.32).

(emphasis in original)). ITT cites no authority for this proposition, and we know of none. We note that the FCC was a defendant in *Writers Guild of America, Inc. v. American Broadcasting Companies, Inc.*, 609 F.2d 355 (1979), cert. denied, 449 U.S. 824 (1980), in which the Ninth Circuit held the FCC to have primary jurisdiction of the questions there presented, notwithstanding allegations that the Commission "[could] not adjudicate a charge of 'serious misconduct' involving itself and its Chairman." 609 F.2d at 363-364.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

BRUCE E. FEIN
General Counsel
Federal Communications Commission

MARCH 1984

Counsel for petitioner: Solicitor General

Counsel for respondent: Lewis, Grant S.

Entry	Date	Note	Proceedings and Orders
1	Jun 25 1983	Application for extension of time to file petition and order granting same until September 3, 1983 (Chief Justice, July 1, 1983).	
2	Sep 2 1983	G Petition for writ of certiorari filed.	
3	Oct 3 1983	Brief of respondent ITT World Communication, Inc. in opposition filed.	
4	Oct 3 1983	Brief amicus curiae of American Bar Association filed.	
5	Oct 5 1983	DISTIPBUTED. October 28, 1983	
6	Oct 25 1983	X Reply brief of petitioners FCC, et al. filed.	
7	Oct 31 1983	Petition GRANTED. *****	
8	Nov 7 1983	Record filed.	
12	Dec 15 1983	Order extending time to file brief of petitioner on the merits until January 9, 1984.	
14	Dec 15 1983	Order extending time to file brief of respondent on the merits until February 24, 1984.	
15	Jan 9 1984	Brief of petitioners FCC, et al. filed.	
16	Jan 9 1984	Joint appendix filed.	
17	Feb 14 1984	SET FOR ARGUMENT. Wednesday, March 21, 1984. (3rd case)	
18	Feb 25 1984	Brief of respondent ITT World Communication, Inc. filed.	
19	Mar 13 1984	X Reply brief of petitioners FCC, et al. filed.	
20	Mar 21 1984	ARGUED.	